(5) (6)

Nos. 98-791, 98-796

IN THE

Supreme Court of the United States

J. DANIEL KIMEL, JR., *et al.*,
Petitioners,
v.
STATE OF FLORIDA BOARD OF REGENTS, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,
v.
FLORIDA BOARD OF REGENTS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

JEREMIAH A. COLLINS
Counsel of Record
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340
Attorneys for Petitioners in No. 98-791

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530
(202) 564-2217
Attorney for United States, Petitioner in No. 98-796

JEFFREY S. SUTTON
Counsel of Record
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
Columbus, OH 43215
(614) 469-3939
Attorneys for Respondents

PETITIONS FOR CERTIORARI FILED NOVEMBER 13, 1998 (No. 98-791) and NOVEMBER 16, 1998 (No. 98-796)
CERTIORARI GRANTED JANUARY 25, 1999

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The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendices to the printed Petitions for Certiorari:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
(TALLAHASSEE)

Case No. 95-CV-40194

J. DANIEL KIMEL, JR.

v.

STATE OF FLORIDA BOARD OF REGENTS, *et al.*

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
6/5/95	2	COMPLAINT FILING FEE $120.00 RECEIPT # 072487 (knr)
		• • • •
6/7/95	6	MOTION by defendant BOARD OF REGENTS to Dismiss—added attorney Peter S. Fleitman. (knr)
		• • • •
6/9/95	7	RESPONSE by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALTMAN, plaintiff DORIS C BAKER, plaintiff ROBERT W BEARD, plaintiff GEORGE BLAKELY, plaintiff VALDALL K BROCK, plaintiff JOHN D CALMAN, plaintiff ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff W SCOTT FORD, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff

DATE	NO.	PROCEEDINGS
		JOANN GARDNER, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDAL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff SALLY J KARIOTH, plaintiff MICHAEL K LAUNER, plaintiff WILLIAM LEPARULO, plaintiff WINSTON LO, plaintiff DEBORAH MAHER, plaintiff RICHARD MARISCAL, plaintiff MARK MESSERSMITH, plaintiff BELEN MILLS, plaintiff RICHARD J MORRIS, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff ELIZABETH PETERS, plaintiff JOSEPH PETTIGREW, plaintiff MARY POHL, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, plaintiff PATRICIA STANLEY, plaintiff JEROME STERN, plaintiff PAUL STRAIT, plaintiff CHARLES SWAIN, plaintiff SHEILA TAYLOR, plaintiff EDWARD WYNOT, plaintiff MARILYN YOUNG to [6-1] motion to Dismiss—added attorney Peter S. Fleitman by BOARD OF REGENTS. (bkp) [Entry date 06/13/95]
		• • • •
7/24/95	9	ORDER denying [7-1] motion response, denying [6-1] motion to Dismiss—added attorney Peter S. Fleitman. Clerk will send out an initial scheduling order, setting 120 days for discovery. (signed by Judge Maurice M. Paul) (Copies mailed as noted on document:) (knr) [Entry date 07/25/95]
		• • • •
8/7/95	12	AMENDED COMPLAINT by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALTMAN, plaintiff DORIS C BAKER, plaintiff ROBERT W BEARD, plaintiff GEORGE BLAKELY, plaintiff VALDALL K BROCK,

DATE	NO.	PROCEEDINGS
		plaintiff JOHN D CALMAN, plaintiff ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff W SCOTT FORD, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff JOANN GARDNER, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDAL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff SALLY J KARIOTH, plaintiff MICHAEL K LAUNER, plaintiff WILLIAM LEPARULO, plaintiff WINSTON LO, plaintiff DEBORAH MAHER, plaintiff RICHARD MARISCAL, plaintiff MARK MESSERSMITH, plaintiff BELEN MILLS, plaintiff RICHARD J MORRIS, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff ELIZABETH PETERS, plaintiff JOSEPH PETTIGREW, plaintiff MARY POHL, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, plaintiff PATRICIA STANLEY, plaintiff JEROME STERN, plaintiff PAUL STRAIT, plaintiff CHARLES SWAIN, plaintiff SHEILA TAYLOR, plaintiff EDWARD WYNOT, plaintiff MARILYN YOUNG amending [2-1] complaint and demand for jury trial (knr)
8/8/95	13	ANSWER to Complaint by defendant BOARD OF REGENTS (Attorney),; jury demand (knr) [Entry date 98/09/95]
		• • • •
8/16/95	18	AMENDED COMPLAINT by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALTMAN, plaintiff DORIS C BAKER, plaintiff ROBERT W BEARD, plaintiff GEORGE BLAKELY, plaintiff VALDALL K BROCK, plaintiff JOHN D CALMAN, plaintiff

DATE	NO.	PROCEEDINGS
		ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff W SCOTT FORD, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff JOANN GARDNER, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDALL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff SALLY J KARIOTH, plaintiff MICHAEL K LAUNER, plaintiff WILLIAM LEPARULO, plaintiff WINSTON LO, plaintiff DEBORAH MAHER, plaintiff RICHARD MARISCAL, plaintiff MARK MESSERSMITH, plaintiff BELEN MILLS, plaintiff RICHARD J MORRIS, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff ELIZABETH PETERS, plaintiff JOSEPH PETTIGREW, plaintiff MARY POHL, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, plaintiff PATRICIA STANLEY, plaintiff JEROME STERN, plaintiff PAUL STRAIT, plaintiff CHARLES SWAIN, plaintiff SHEILA TAYLOR, plaintiff EDWARD WYNOT, plaintiff MARILYN YOUNG, plaintiff PHILIP LAZARUS, plaintiff RONALD MARTIN, plaintiff ROBERT R MEAD DONALDSON, plaintiff WILLIAM G O'BRIEN, plaintiff RICHARD P SUGG, plaintiff CHARLES G MACDONALD, plaintiff RICHARD L IVERSON (Answer due 9/5/95 for BOARD OF REGENTS) amending [12-1] amended complaint by plaintiffs, [2-1] complaint (knr)
		• • • •
11/15/95	35	Second AMENDED COMPLAINT by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALT-

DATE	NO.	PROCEEDINGS
		MAN, plaintiff DORIS C BAKER, plaintiff ROBERT W BEARD, plaintiff GEORGE BLAKELY, plaintiff VALDALL K BROCK, plaintiff JOHN D CALMAN, plaintiff ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff W SCOTT FORD, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff JOANN GARDNER, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDAL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff SALLY J KARIOTH, plaintiff MICHAEL K LAUNER, plaintiff WILLIAM LEPARULO, plaintiff WINSTON LO, plaintiff DEBORAH MAHER, plaintiff RICHARD MARISCAL, plaintiff MARK MESSERSMITH, plaintiff BELEN MILLS, plaintiff RICHARD J MORRIS, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff ELIZABETH PETERS, plaintiff JOSEPH PETTIGREW, plaintiff MARY POHL, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, plaintiff PATRICIA STANLEY, plaintiff JEROME STERN, plaintiff PAUL STRAIT, plaintiff CHARLES SWAIN, plaintiff SHEILA TAYLOR, plaintiff EDWARD WYNOT, plaintiff MARILYN YOUNG, plaintiff PHILIP LAZARUS, plaintiff RONALD MARTIN, plaintiff ROBERT MEAD DONALDSON, plaintiff WILLIAM G O'BRIEN, plaintiff RICHARD P SUGG, plaintiff CHARLES G MACDONALD, plaintiff RICHARD L IVERSON amending (knr) [Edit date 11/15/95]

• • • •

DATE	NO.	PROCEEDINGS
11/28/95	42	ANSWER by defendant BOARD OF REGENTS to second amended complaint; jury demand (knr)
		• • • •
2/20/96	63	Deft. amendment to affirmative defenses (knr)
4/19/96	86	MOTION by defendant BOARD OF REGENTS to Dismiss the complaint. (knr) [Entry date 04/22/96]
		• • • •
4/22/96	91	3rd AMENDED COMPLAINT by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALTMAN, plaintiff ROBERT W BEARD, plaintiff VALDALL K BROCK, plaintiff JOHN D CALMAN, plaintiff ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDAL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff WILLIAM LEPARULO, plaintiff WINSTON LO, plaintiff DEBORAH MAHER, plaintiff RICHARD MARISCAL, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff JOSEPH PETTIGREW, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, JEROME STERN, plaintiff CHARLES SWAIN, plaintiff EDWARD WYNOT, plaintiff PHILIP LAZARUS, plaintiff RONALD MARTIN, plaintiff ROBERT R MEAD DONALDSON, plaintiff RICHARD P SUGG, plaintiff CHARLES G MACDONALD, plaintiff RICHARD L IVERSON (Answer due 5/13/96 for BOARD OF REGENTS) amending the complaint (smb)
		• • • •

DATE	NO.	PROCEEDINGS
4/29/96	96	RESPONSE by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALTMAN, plaintiff ROBERT W BEARD, plaintiff VALDALL K BROCK, plaintiff JOHN D CALMAN, plaintiff ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDAL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff WILLIAM LEPARULO, plaintiff RICHARD MARISCAL, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff JOSEPH PETTIGREW, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, plaintiff JEROME STERN, plaintiff CHARLES SWAIN, plaintiff EDWARD WYNOT, plaintiff PHILIP LAZARUS, plaintiff RONALD MARTIN, plaintiff ROBERT R MEAD DONALDSON, plaintiff RICHARD P SUGG, plaintiff CHARLES G MACDONALD, plaintiff RICHARD L IVERSON to [86-1] motion to Dismiss the complaint by BOARD OF REGENTS. (bkp)
		• • • •
5/14/96	99	ANSWER by defendant BOARD OF REGENTS to Third amended complaint; jury demand (knr)
		• • • •
5/17/96	103	ORDER granting [84-1] motion for substitution of party-plaintiff Maxine Stern for Jerome Stern. Order denying [86-1] motion to Dismiss the complaint (signed by Judge

DATE	NO.	PROCEEDINGS
		Maurice M. Paul) (Copies mailed as noted on document:) (tdg)
		* * * *
5/23/96	107	RESPONSE (Second amendment) by defendant BOARD OF REGENTS to affirmative defenses. (bkp) [Entry date 05/24/96]
		* * * *
5/23/96	108	MOTION by defendant BOARD OF REGENTS to Amend [103-1] order denying dft. motion to dismiss for lack of subject matter jurisdiction (bkp) [Entry date 05/24/96]
5/23/96	113	TRIAL BRIEF by plaintiffs J DANIEL KIMEL JR., RALPH C DOUGHERTY, BURTON H ALTMAN, ROBERT W BEARD, VALDALL K BROCK, D CALMAN, ELAINE D CANCALON, SIWO DE KLOET, JOSEPH DONOGHUE, PHILLIP DOWNS, RICHARD DUNHAM, ROBERT L FULTON, ALICE GAAR, RICHARD GLICK, BRUCE GRINDAL, WILLIAM HEARD, HERMAN G JAMES, WILLIAM LEPARULO, WINSTON LO, DEBORAH MAHER, RICHARD MARISCAL, CONNIE G MORRIS, SHARON E NICHOLSON, LUCIA PATRICK, JOSEPH PETTIGREW, JOHN QUINE, KATHERINE SHELFER, CHARLES SWAIN, EDWARD WYNOT, PHILIP LAZARUS, RONALD MARTIN, ROBERT R MEAD DONALDSON, RICHARD P SUGG, CHARLES G MACDONALD, RICHARD L IVERSON, MAXINE STERN (knr) [Entry date 05/28/96]
5/23/96	114	JOINT PRETRIAL STIPULATION by plaintiffs and Defendant (knr) [Entry date 05/28/96]
		* * * *
6/3/96	119	MOTION by defendant BOARD OF REGENTS to Stay pending appeal of order deny-

DATE	NO.	PROCEEDINGS
		ing dft. claim of 11th amendment immunity (bkp) [Entry date 06/04/96]
6/3/96	120	NOTICE OF INTERLOCUTORY APPEAL of [103-1] order by defendant BOARD OF REGENTS FILING FEE $105.00 RECEIPT # 076851 (knr) [Entry date 06/05/96]
		• • • •
7/22/96	127	ORDER granting [119-1] motion to Stay pending appeal of order denying dft. claim of 11th amendment immunity. Further proceedings in this cause are STAYED pending resolution by the ECCA of deft's interlocutory appeal. The parties will report to the court the status of the appeal, including when oral arguments are scheduled to be heard as well as final disposition of the appeal. This court will schedule a status conference after the ECCA has ruled on the appeal. (signed by Judge Maurice M. Paul) (Copies mailed as noted on document:) (tdg)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
(SOUTHERN)

Case No. 94-CV-2962

RODERICK MACPHERSON, *et al.*

v.

UNIVERSITY OF MONTEVALLO

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/8/94	1	COMPLAINT filed, amount paid $120, receipt # 200 89717 (cko) [Entry date 12/12/94]
		• • • •
2/6/95	3	ANSWER by defendant filed cs (cko)
		• • • •
7/26/95	17	AMENDED complaint filed, by plaintiffs [1-1]; jury demand filed cs (cko)
7/26/95	18	AMENDED (second) complaint filed, by plaintiffs [17-1], [1-1]; jury demand filed cs (cko)
		• • • •
8/11/95	19	ANSWER to amended complaint by defendant Univ of Montevallo filed cs (cko) [Entry date 08/14/95]
		• • • •
5/31/96	23	MOTION by defendant Univ of Montevallo for partial summary judgment filed cs (cko) [Entry date 06/03/96]
		• • • •

DATE	NO.	PROCEEDINGS
7/19/96	37	MEMORANDUM opinion filed (by Judge William M. Acker Jr) cm (cko)
7/19/96	38	ORDER granting in part and denying in part dft's motion for partial summary judgment [23-1] as further set out in order filed (by Judge William M. Acker Jr) cm (cko)
7/25/96	39	MOTION by defendant Univ of Montevallo to dismiss ADEA claims filed cs (cko)
		• • • •
9/9/96	47	MEMORANDUM opinion filed (by Judge William M. Acker Jr) cm (cko)
9/9/96	48	ORDER to dismiss case with prejudice in accordance with accompanying memorandum opinion filed (by Judge William M. Acker Jr) cm (cko)
9/17/96	49	NOTICE of appeal by Roderick MacPherson, Marvin Narz from District Court decision entered 9/9/96 [48-2] ; notice of appeal, order appealed from and court copy of docket entries letter mailed cm (cko)
11/22/96	34	ANSWER, affirmative defenses and jury trial demand to Complaint by defendant FLORIDA DOC; jury demand (sjw) [Entry date 11/25/96]
11/25/96	35	AMENDED NOTICE OF APPEAL by defendant [32-1] appeal by FLORIDA DOC, [29-1] order denying defendant's motion to dismiss on 11th amendment jurisdictional grounds (sjw) [Entry date 11/26/96]
11/26/96	36	ORDER denying [33-1] motion to Stay pending appeal of order denying claim of eleventh amendment immunity (signed by Judge Robert L. Hinkle) (Copies mailed as noted on document:) (sjw)
		• • • •

DATE	NO.	PROCEEDINGS
12/27/96	42	Notice of Appeal and certified copy of docket to USCA: [35-1] appeal by FLORIDA DOC, [32-1] appeal by FLORIDA DOC (Copies mailed as noted on document:) (sjm)
		• • • •
3/13/97	50	MOTION by defendant FLORIDA DOC for clarification of pre trial order dated 2/21/97 re: stay granted by USCA on 1/14/97 (sjw)
3/14/97	51	ORDER by Judge Robert L. Hinkle granting [50-1] motion for clarification of pre trial order dated 2/21/97 re: stay granted by USCA on 1/14/97. Vacating [47-1] pre-trial order. Staying proceedings pending order from USCA (Copies mailed as noted on document) (plk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
(PANAMA CITY)

Case No. 96-CV-207

WELLINGTON N. DICKSON

v.

FLORIDA DEPARTMENT OF CORRECTIONS

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
5/9/96	1	COMPLAINT FILING FEE $120.00 RECEIPT # 074591 (cbp)
		• • • •
8/15/96	5	MOTION by defendant JIM FOLSOM, defendant JAMES EDWARD CHILDS to Dismiss the complaint against defts FOLSOM & CHILDS (added attorney Lynn Gail Franklin). (9/2) (cbp) [Entry date 08/19/96] [Edit date 08/20/96]
		• • • •
9/24/96	18	MOTION by defendant FLORIDA DOC, defendant JACKSON CORRECTION to Dismiss—added attorney Lynn Gail Franklin. (plk) [Entry date 09/25/96]
		• • • •
10/1/96	20	ORDER granting [5-1] motion to Dismiss the complaint against defts FOLSOM & CHILDS denying [9-1] motion for Entry of Default

DATE	NO.	PROCEEDINGS
		as to defendant FLORIDA DOC, defendant JACKSON CORRECTION. Answer deadline to 11/1/96 for JACKSON CORRECTION, for FLORIDA DOC, to Return File to Court by 11/1/96, if no service upon DOC, Jackson Co. (signed by Judge Robert L. Hinkle) (Copies mailed as noted on document:) (sjw)
		• • • •
11/5/96	29	ORDER granting in part, denying in part [18-1] motion to Dismiss. Plaintiff's claims for punitive damages are dismissed as are all claims against Jackson Correctional Institution. (signed by Judge Robert L. Hinkle) (Copies mailed as noted on document:) (plk) [Entry date 11/06/96]
		• • • •
11/15/96	32	NOTICE OF APPEAL by defendant FLORIDA DOC of [29-1] order FILING FEE $105. RECEIPT # 80221 (sjw) [Entry date 11/19/96]
11/21/96	33	MOTION by defendant FLORIDA DOC to Stay pending appeal of order denying claim of eleventh amendment immunity. (sjw) [Entry date 11/22/96]
		• • • •

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 96-2788

J. DANIEL KIMEL, JR., *et al.*

v.

STATE OF FLORIDA BOARD OF REGENTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	• • • •
12/3/96	Flg. order: The motion filed by Appellants in 96-6947 to consolidate these two appeals (96-2788 & 96-6947) is GRANTED to the extend that the cases are consolidated for screening, and for oral argument if this Court determines that these cases should be orally argued. They are not consolidated for briefing purposes. The motion filed by Appellants in 96-6947 for an extension of time to file their brief is DENIED AS MOOT. The motion filed in 96-6947 by the National Employment Lawyers Association for leave to file a brief as *amicus curiae* is GRANTED. The motion filed in 96-6947 by the American Association of Retired Persons for leave to file a brief as *amicus curiae* is GRANTED. (EEC) (j)/ols
12/4/96	Flg. USA's motion to intervene.ols (12/24/96 sbmd to judge)ols
1/10/97	Flg. order: The motion to intervene filed in 96-6947 by the United States of America is GRANTED. (JFD) (j)/ols

DATE	PROCEEDINGS
1/14/97	Flg. Order Case 96-3773: Appellant's motion for stay pending appeal is GRANTED. This court, on its own motion, ORDERS that this case be consolidated with 96-2788 and 96-6947 for screening and also for oral argument, if this court determines that oral argument is appropriate. (RLA/JFD/SHB)/bmc
4/30/98	Opinion filed in 96-3773 & 96-6947. ☒☒ 96-2788, REVERSED & REMANDED 96-3773, AFFIRMED in pt./REVERSED in pt & REMANDED 96-6947 AFFIRMED
4/30/98	Judgment Entered
6/15/98	Petition for Rehearing USA/Intr.ols (96-6947)
6/19/98	Petition for Rehearing JDK/appes.ols
8/17/98	Order Denying Rehearing. ols
9/3/98	Judgment & Opinion issued to Clerk as Mandate.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 96-3773

WELLINGTON N. DICKSON

v.

FLORIDA DEPARTMENT OF CORRECTIONS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/18/96	Flg. appellant's motion for stay pending appeal and supporting memorandum tbs (panel 12/24/96. tbs)
12/30/96	Flg. appellee's opposition to appellant's motion for stay. tbs
01/14/97	Flg. ORDER: Appellant's motion for stay pending appeal is GRANTED. This court, on its own motion, ORDERS that this case be consolidated with 96-2788 and 96-6947 for screening, and also for oral argument, if this court determines that oral argument is appropriate. (RLA/JFD/SHB) (J) tbs (stays further district court action pending appeal)
	• • • •
9/19/97	Flg. Motion of U.S. To Exercise Its Right to Intervene . . . and to File the Attached Brief for the United States. (Submitted to OA panel) fd
	• • • •
9/29/97	ORD: Motion of the United States to exercise its right to intervene is granted. Motion of the

DATE	PROCEEDINGS
	United States to file a brief out of time is granted. (JWH) fd
	• • • •
4/30/98	Opinion filed in 96-2788, 96-3773 & 96-6947 96-2788, REVERSED & REMANDED, 96-3773, AFFIRMED in pt./REVERSED in pt & REMANDED. 96-6947 AFFIRMED
4/30/98	Judgment Entered
5/20/98	Petition for Rehearing FL DOC/appt.ols
6/15/98	Petition for Rehearing USA/Intr.ols (96-6947)
6/15/98	Petition for Rehearing WND/appe.ols
	• • • •
8/17/98	Order Denying Rehearing.ols
	• • • •
9/3/98	Judgment & Opinion issued to Clerk as Mandate

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 96-6947

RODERICK MACPHERSON, *et al.*

v.

UNIVERSITY OF MONTEVALLO

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/3/96	Flg. order: The motion filed by Appellants in 96-6947 to consolidate these two appeals (96-2788 & 96-6947) is GRANTED to the extend that the cases are consolidated for screening, and for oral argument if this Court determines that these cases should be orally argued. They are not consolidated for briefing purposes. The motion filed by Appellants in 96-6947 for an extension of time to file their brief is DENIED AS MOOT. The motion filed in 96-6947 by the National Employment Lawyers Association for leave to file a brief as *amicus curiae* is GRANTED. The motion filed in 96-6947 by the American Association of Retired Persons for leave to file a brief as *amicus curiae* is GRANTED. (EEC) (j)/ols
12/05/96	Flg. Motion of the United States to exercise its right to intervene to defend the constitutionality of the Age Discrimination in Employment Act (12/24/96 sbmd to judge) ols

DATE	PROCEEDINGS
1/10/97	Flg. order: The motion to intervene filed in 96-6947 by the United States of America is GRANTED. (JFD) (j)/ols
1/14/97	Flg. Order in 96-3773: Appellant's motion for stay pending appeal is GRANTED. This court, on its own motion, ORDERS that this case be consolidated with 96-2788 & 96-6947 for screening, and also for oral argument, if this court determines that oral argument is appropriate (RLA)/(JFD/SHB)/bmc
	• • • •
4/30/98	Opinion filed in 96-2788, 96-3773 & 96-6947 96-2788, REVERSED & REMANDED, 96-3773, AFFIRMED in pt./REVERSED in pt & REMANDED 96-6947 AFFIRMED.
4/30/98	Judgment Entered
	• • • •
6/15/98	Petition for Rehearing USA/Intr.ols
6/15/98	Petition for Rehearing JDK/appes.ols (96-2788)
	• • • •
8/17/98	Order Denying Rehearing
	• • • •
9/3/98	Judgment & Opinion issued to Clerk as Mandate

[Filed Dec. 8, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No.: CV-94-AR-2962-S

RODERICK MACPHERSON AND MARVIN NARZ,
Plaintiffs

vs.

UNIVERSITY OF MONTEVALLO,
Defendant

COMPLAINT

I. *Jurisdiction*

1. The jurisdiction of this Court is invoked pursuant to 28 USC § 1331, 1343(4), 2201, 2202, 1367; 29 USC § 216(b), and 626. This is a suit authorized and instituted pursuant to the "Age Discrimination Act" (ADEA), 29 USC § 621, *et seq.* The jurisdiction of this Court is invoked to secure protection of and redress deprivation of rights secured by 29 USC § 621, *et. seq.*, providing for injunctive and other relief against age discrimination and retaliation, as well as, pendent state claims.

2. Plaintiffs have fulfilled all conditions precedent to the institution of this action under the ADEA. Plaintiff timely filed his charge of discrimination within 180 days of the occurrence of the last discriminatory act, and within 90 days of receipt of his notice of right to sue from the Equal Employment Opportunity Commission (EEOC).

II. *Parties*

3. Plaintiff, Robert MacPherson's date of birth is August 3, 1937, and Plaintiff, Marvin Narz's date of birth is August 31, 1936. Both Plaintiffs are employed as associate professors with Defendant. Both Plaintiffs are citizens of the United States, and residents of Jefferson County, Alabama.

4. Defendant University of Montevallo is a business entity doing business in Shelby County, Alabama. Defendant is subject to ADEA in that it is engaged in an industry effecting commerce and has twenty (20) or more employees for each working day and each of twenty (20) or more calendar weeks in the current and preceding year.

III. *Claim One—Age Discrimination in Employment*

5. Plaintiffs re-allege and incorporate by reference paragraphs 1-4 above with the same force and effect as if set forth in specific detail below.

6. Defendant has engaged in an ongoing pattern of discrimination against Plaintiffs since the early 1980's as a result of Plaintiffs' age and in retaliation for Plaintiffs' filing of internal grievances, and charges of discrimination with the EEOC. Plaintiffs are the two oldest faculty members at the College of Business department of Defendant.

7. Defendant has followed a continuing practice of treating younger faculty members more favorably than older faculty members. This illegal continuing practice is clearly shown in the denial of promotions, committee assignments, sabbaticals, and in salaries paid to each Plaintiff.

8. Defendant, at least in the College of Business, has used an age based evaluation system to discriminate

against both Plaintiffs in regards to denial of promotions, job related assignments, benefits and salary. Plaintiffs aver that Defendant's practice with respect to these areas has had a disparate impact on older faculty members and that Defendant has disparately treated its older faculty members.

9. Plaintiffs have been subjected to unequal treatment regarding their terms and conditions of employment because of their age, and in retaliation for their previous EEOC charges, and their lawsuit based on age discrimination. Plaintiffs previously sued Defendant in the United States District Court for the Northern District of Alabama (Case Number CV 88-B-1341-S). This matter was settled between the parties prior to trial, and is subject to a confidentiality agreement. The subject of that lawsuit were allegations by Plaintiffs against Defendant of age discrimination in the terms and conditions of their employment. That case was settled on July 10, 1992.

10. Since the settlement of the lawsuit set forth in the preceding paragraph, Defendant has engaged in a continuing practice of discrimination and retaliation against Plaintiffs. Said discrimination and retaliation was done willfully, with malicious disregard for the rights of the Plaintiffs.

11. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for back pay, injunctive and declaratory judgment, and liquidated damages are their only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from Defendant's unlawful policy and practices as set forth herein unless enjoined by this Court.

IV. *Claim Two—Freedom of Speech*

12. Plaintiffs re-allege and incorporate by reference paragraphs 1-11 above with the same force and effect as if set forth in specific detail below.

13. Plaintiffs aver that as a result of their filing internal grievances with Defendant, charges of discrimination with the EEOC, and a lawsuit against Defendant; Defendant, through the dean of the college of business, William Ward, has denied Plaintiffs committee assignments, sabbaticals, adjustments to salaries, and other benefits due Plaintiffs by virtue of their qualifications and tenure.

14. Plaintiffs allege that they have the right under the First Amendment of the United States Constitution to protest the policies and practices of Defendant. Plaintiffs have exercised these First Amendment rights by filing charges of discrimination with the EEOC, and by filing suit against Defendant, and by challenging the policies and practices of Defendant. As a result of their exercise of their First Amendment rights, Defendant has taken action against Plaintiff as set forth herein.

15. Irreparable harm has resulted to Plaintiffs in that they have been denied pay raises, committee assignments, and promotion as a result of the exercise of their First Amendment rights.

V. *Prayer for Relief*

WHEREFORE, Plaintiffs respectfully prays that this Court will assume jurisdiction of this action and after trial:

1. Issue a declaratory judgment that the employment policies, practices, procedures, conditions and customs of Defendant are violative of the rights of Plaintiffs, as se-

cured by ADEA and the First Amendment of the Constitution.

2. Grant Plaintiffs a permanent injunction enjoining Defendant, its agents, its successors, employees, attorneys and those acting in concert with Defendant, and at Defendants request from continuing to violate ADEA and the First Amendment.

3. Enter an order requiring Defendant to make Plaintiffs whole by awarding each of them their back pay (plus interest), by promoting them to full professor, appointing them to committee assignments appropriate with their tenure and qualifications, provide sabbatical leave for Plaintiffs, each of which were lost as a result of Defendant's discriminatory practices alleged herein, as well as, by awarding them nominal, compensatory and punitive damages.

4. Plaintiffs pray for such other relief and benefits as the cause of justice may require, including but not limited to an award of costs, attorney's fees and expenses.

Respectfully submitted,

/s/ David R. Arendall
DAVID R. ARENDALL
Attorney for Plaintiffs
1650 Financial Center
505 North 20th Street
Birmingham, AL 35203
(205) 252-1550

PLAINTIFFS DEMAND TRIAL BY STRUCK JURY.

/s/ David R. Arendall
DAVID R. ARENDALL

DEFENDANT'S ADDRESS:

c/o Office of the President
Station 6001
Montevallo, AL 35115

[Filed May 26, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No.: CV 88-B-1341-S

RODERICK MACPHERSON AND MARVIN NARZ
Plaintiffs

VS.

UNIVERSITY OF MONTEVALLO
Defendant

AMENDED COMPLAINT

Come now the Plaintiffs and amend their complaint, originally filed on December 8, 1994 by the addition thereto of the following:

CLAIM THREE

16. Plaintiffs incorporate by reference, as if fully set forth herein, each and every material averment contained in their original complaint, filed December 8, 1994, paragraphs 1-15.

17. In December 19, 1994, Plaintiff MacPherson was denied an incentive retirement package. Plaintiff Narz was denied a similar incentive retirement package in March, 1995. No reason was given by officials with Defendant for the denial of these retirement packages for Plaintiffs, although they had been granted to other employees who had not filed charges and lawsuits alleging age discrimination and retaliation, as had Plaintiffs.

18. In March, 1995, both Plaintiffs were denied promotions to full professorship by officials with Defendant. Neither Plaintiff was justifiably denied such promotions.

19. Plaintiffs aver that the above mentioned denials by officials with Defendant were based upon Plaintiffs' age and/or in retaliation for Plaintiffs' claims of age discrimination previously made to Defendant. These denials are part of a continuing practice by Defendant of treating younger faculty members, and those members not alleging claims of discrimination against Defendant, more favorably than Plaintiffs.

20. Plaintiffs have no plain, adequate, or complete remedy at law to redress the wrongs alleged herein and this suit for back pay, injunctive and declaratory relief, and liquidated damages are their only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from Defendant's unlawful policies and practices as set forth, unless enjoined by this Court.

WHEREFORE, Plaintiffs pray that this Court will enter an Order requiring Defendant to make Plaintiffs whole by awarding each of them their back pay, plus interest, by promoting them to full professor, by requiring them to offer the incentive retirement packages offered to other employees, as well as liquidated damages, their attorney's fees, expenses and costs.

Respectfully submitted,

/s/ David R. Arendall
DAVID R. ARENDALL
Attorneys for the Plaintiffs
1650 Financial Center
505 North 20th Street
Birmingham, AL 35203
(205) 252-1550

[Filed June 30, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Caption Omitted]

SECOND AMENDED COMPLAINT

Come now the Plaintiffs and amend their complaint, originally filed on December 18, 1994 by the addition thereto of the following:

21. Plaintiffs amend paragraph 17 of their Amended Complaint by the deletion of the dates of December 19, 1994 and March, 1995 and the substitution thereof of "prior to November 19, 1994".

CLAIM FOUR

22. Plaintiffs incorporate by reference, as if fully set forth herein, each and every material averment contained in their original complaint, as is amended, paragraphs 1-20.

23. Defendant has unlawfully discriminated against Plaintiffs by allowing Plaintiffs to be harassed by their superiors, including Dean William Word, as agent/employees of Defendant. This harassment has taken place over a continuous period of several years, and has made Plaintiffs' working conditions intolerable.

24. Throughout the period that both Plaintiffs have been employed with Defendant, they have been denied salary increases, sabbatical leave, teaching assignments,

early retirement benefit packages, committee assignments and other conditions of their employment, which have been granted to other employees. This harassment, and denial of benefits and conditions of their employment has been as a direct result of Plaintiffs' age, and in retaliation for Plaintiffs' claims of age discrimination.

25. Defendant has condoned and ratified the actions of its agent/employees, including Dean William Word. Defendant has knowledge of the actual conduct and has failed to take adequate steps to remedy the situation.

26. Plaintiffs' have no plain, adequate or complete remedy at law to redress the wrongs alleged herein in this suit for backpay, injunctive and declaratory judgment are their only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from Defendant's unlawful policies and practices as set forth herein unless enjoined by this Court. Plaintiffs further pray for such other and different relief which justice may require, including but not limited to an award of costs, attorney's fees and expenses.

Respectfully submitted,

/s/ David R. Arendall
DAVID R. ARENDALL
Attorney for the Plaintiffs
1650 Financial Center
505 North 20th Street
Birmingham, AL 35203
(205) 252-1550

[Filed Jul. 25, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. TCA 95-40194-MMP

J. DANIEL KIMEL, JR., *et al.*,
Plaintiffs,

v.

FLORIDA BOARD OF REGENTS,
Defendant.

ORDER

This cause comes before the Court upon Defendant's motion to dismiss and alternative motion for a more definite statement (doc. 6), to which Plaintiffs have responded (doc. 7). For the reasons outlined below, Defendant's motions are DENIED.

BACKGROUND:

Plaintiffs are all over 40 years old, and are current and former faculty and librarians at Florida State University. Plaintiffs allege that in 1991, the United Faculty of Florida and Defendant Florida Board of Regents agreed to apply market adjustments to the salary of eligible State University employees. These market adjustments

> . . . were intended to equalize the salaries of long-time employees of the Defendant whose previous yearly raises did not adequately reflect the market

> value of the services provided by such employees commensurate with their experience and when compared with employees more recently hired (Complaint, doc. 2 at ¶ 10).

The Board of Regents disbursed salaries based on the market adjustments during the 1991-92 fiscal year.

However, late in the 1992-93 fiscal year, Plaintiffs allege the Board notified the United Faculty of Florida that the Board would no longer require the State University System to provide the market adjustments. Florida State University subsequently stopped paying eligible employees, including Plaintiffs, the market adjustments for the remainder of the 1992-93 fiscal year. According to the complaint, Florida State University has continued to refuse to adjust Plaintiffs' base salaries to include the market adjustments, even though funds were made available for such adjustments during the 1993-94 and 1994-95 fiscal years.

Plaintiffs contend that Defendant's refusal to provide the market adjustment has resulted in a disparate impact on the base pay of employees with a longer record of service—particularly older employees. According to Plaintiffs, older employees eligible for the market adjustments have seen an average salary decrease of 9.7 percent, compared to an overall 1.5 percent reduction in funds for all employees of the State University System.

Plaintiffs therefore filed the instant action pursuant to 29 U.S.C. § 621, the Age Discrimination in Employment Act ("ADEA"), and Florida Statutes Chapter 760, the Florida Human Rights Act. Plaintiffs seek an award of backpay and other lost employment benefits, liquidated damages, attorneys' fees and costs, and other relief the Court may deem appropriate. Plaintiffs allege all administrative prerequisites have been met because they filed

notice of their claims at least 60 days prior to commencing their action.[1] Jurisdiction is properly in this Court in that Plaintiffs' claims raise a federal question pursuant to 28 U.S.C. § 1331.

DISCUSSION:

Defendant moves to dismiss Plaintiffs' complaint on the ground that Plaintiffs fail to sufficiently allege facts to support their ADEA and pendent state law claims[2] (doc. 6).

A complaint is not to be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). The burden of demonstrating no claim has been stated is on the movant. *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980). Furthermore, "in reviewing the sufficiency of a complaint in the context of a motion to dismiss [the court must] . . . treat all of the well-pleaded allegations of the complaint as true." *Miree v. Dekalb County, Ga.*, 433 U.S. 25, 27 n.2, 97 S.Ct. 2490, 2492 n.2, 53 L.Ed.2d 557 (1977). These pre-requisites for dismissal have not been demonstrated here.

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[1] The ADEA provides that no civil action under the Act may be commenced until 60 days after a charge alleging unlawful discrimination has been filed with the EEOC. The charge must be filed within 180 days after the alleged unlawful employment practice occurred. *See* 29 U.S.C. § 626(d).

[2] Plaintiffs' claims under chapter 760, Florida Statutes, are parallel remedies for the ADEA, which utilizes the same prima facie case for age discrimination as found in the Act. *See Kelly v. K.D. Constr. of Fla., Inc.*, 866 F. Supp. 1406, 1411 (S.D.Fla. 1994) ("Because the Florida Human Rights Act is patterned after Title VII, federal case law dealing with Title VII also applies to the Florida Human Rights Act.").

As an initial matter, Defendant contends that Plaintiffs appear to be alleging a breach of contract claim, rather than a violation of the ADEA. However, as "masters of the complaint," *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 395, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318 (1987), Plaintiffs have chosen to ground their claims under the ADEA. Consequently, if Plaintiffs can state an ADEA claim, the court should not disturb their selection of remedies.

Defendant argues that Plaintiffs cannot state an ADEA claim. Defendant recites the prima facie case for a disparate treatment claim under the ADEA, and then states that Plaintiffs' "bare allegations" fail to allege all of the required elements of that claim (doc. 6 at 2).

Plaintiffs respond by pointing out that their ADEA claims are premised under a disparate impact, not a disparate treatment, theory (doc. 7). A disparate impact claim may be brought under the ADEA. *See MacPherson v. University of Montevallo*, 922 F.d 766, 771 (11th Cir. 1991). Generally, in order to prove a disparate impact claim, a plaintiff must show that an employer's facially neutral practice or test caused a discriminatory impact on a protected group and the practice or test cannot be justified as a matter of business necessity. *Edwards v. Wallace Community College*, 49 F.3d 1517, 1520 (11th Cir. 1995); *MacPherson*, 922 F.2d at 771. Although a plaintiff need not show a discriminatory motive, *Edwards*, 49 F.3d at 1520, a plaintiff must still isolate and identify "the specific employment practices that are allegedly responsible for any observed statistical disparities." *MacPherson*, 922 F.d at 771 (quoting *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656, 109 S.Ct. 2115, 2124, 104 L.Ed.2d 733 (1989)).

Defendants concede that the Plaintiffs have properly alleged they are in the protected class of individuals encompassed by the ADEA.[3] Plaintiffs have also sufficiently alleged they were subjected to a facially neutral policy—suspending the market adjustment payments—that has had the statistical effect of creating a disparity between more tenured, older faculty members, and newer, younger, faculty members.[4] Drawing all inferences in Plaintiffs' favor, the complaint states a cognizable disparate impact claim under the ADEA. As a result, Defendant's motion to dismiss (doc. 6) is DENIED.

In the alternative, Defendant moves for a more definite statement. It is true that a claim made under the ADEA "must at least inform the court and the defendant generally of the reasons the plaintiff believes age discrimination has been practiced." *Dugan v. Martin Marietta Aerospace*, 760 F.2d 397, 399 (2d Cir. 1985). However, as noted above, Plaintiffs' complaint has done that. Therefore, Defendant's alternative motion for a more definite statement (doc. 6) is DENIED.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Defendant's motion to dismiss and alternative motion for a more definite statement (doc. 6) are DENIED.

2. The clerk of the court will send out an initial scheduling order, setting 120 days for discovery.

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[3] The ADEA's prohibitions are limited to "individuals who are at least 40 years of age." 29 U.S.C. § 631 (1986).

[4] Plaintiffs have included a copy of the market adjustment agreement as an attachment to the complaint.

DONE AND ORDERED this 24th day of July, 1995.

/s/ Maurice M. Paul
MAURICE M. PAUL
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No. CV-94-AR-2962-S

RODERICK MACPHERSON and MARVIN NARZ,
Plaintiffs,

v.

UNIVERSITY OF MONTEVALLO,
Defendant.

ANSWER TO AMENDED COMPLAINT

For answer to the numbered paragraphs of the first and second amended complaint, the University of Montevallo responds as follows:

16. Defendant incorporates its responses to paragraphs 1 through 15 of its answer to the original complaint.

17. Denied.

18. Defendant admits that neither plaintiff received a promotion; the averments of this paragrph are otherwise denied.

19. Denied.

20. Denied.

21. Denied as amended.

22. Defendant incorporates its responses to paragraphs 1 through 20.

23. Denied.

24. Denied.

25. Denied to the extent the allegation implies unlawful conduct on the part of Dean Word or the University of Montevallo.

26. Denied.

FIRST AFFIRMATIVE DEFENSE

The complaint as amended fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The complaint as amended is barred by the doctrines of *res judicata* and collateral estoppel.

THIRD AFFIRMATIVE DEFENSE

The complaint as amended is barred by the statute of limitations, or, in the alternative, laches.

FOURTH AFFIRMATIVE DEFENSE

The complaint as amended is barred by the terms of a settlement and release agreed to by plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

The complaint as amended is barred by plaintiffs' failure to exhaust available administrative remedies.

/s/ Carl Johnson
CARL JOHNSON
Attorney for Defendant
Alabama Bar No. 416-76-5997

BISHOP, COLVIN, JOHNSON & KENT
317-20th Street, North
P. O. Box 370404
Birmingham, Alabama 35237
(205) 251-2881

IN THE UNITED STATES DISTRICT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. 95-40194-MP

J. DANIEL KIMEL, JR., RALPH C. DOUGHERTY, BURTON H. ALTMAN, ROBERT W. BEARD, VANDALL K. BROCK, JOHN D. CALMAN, ELAINE D. CANCALON, SIWO DE KLOET, JOSEPH F. DONOGHUE, PHILLIP E. DOWNS, RICHARD M. DUNHAM, ROBERT L. FULTON, ALICE C. GAAR, RICHARD E. GLICK, BRUCE T. GRINDAL, WILLIAM H. HEARD, HERMAN G. JAMES, JR., WILLIAM E. LEPARULO, WINSTON W. LO, DEBORAH B. MAHER, RICHARD N. MARISCAL, CONNIE G. MORRIS, SHARON E. NICHOLSON, LUCIA PATRICK, JOSEPH J. PETTIGREW, JR., JOHN R. QUINE, KATHERINE M. SHELFER, JEROME H. STERN, CHARLES W. SWAIN, EDWARD D. WYNOT, JR., PHILIP LAZARUS, RONALD W. MARTIN, ROBERT R. MEAD-DONALDSON, RICHARD P. SUGG, CHARLES G. MACDONALD, RICHARD L. IVERSON,

Plaintiffs,

v.

FLORIDA BOARD OF REGENTS,

Defendant.

THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

I.

Plaintiffs sue the Florida Board of Regents and allege the following:

1. This action is brought pursuant to 29 U.S.C. § 621, *et seq.*, the Age Discrimination in Employment Act ("ADEA").

2. A copy of this Third Amended Complaint is being served upon the Department of Insurance, in accordance with Section 284.30, *Florida Statutes* (1993).

II.

Jurisdiction and Venue

3. Jurisdiction over this matter is invoked pursuant to 28 U.S.C. § 1331.

4. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b).

III.

Parties

5. Defendant, Florida Board of Regents, is an "employer" as that term is defined under 29 U.S.C. § 630.

6. Plaintiffs are "employees" as that term is defined under 29 U.S.C. § 630.

7. Plaintiffs are all over 40 years of age, and are current and former faculty and librarians at Florida State Univesity or Florida International University.

8. Pursuant to Equal Employment Opportunity Commission ("EEOC") rules Plaintiff Kimel filed a charge of discrimination with EEOC on behalf of himself and all long-term faculty and librarians in the protected age group on April 4, 1994. Plaintiffs Altman, Grindal, Shelfer and Kimel filed the same charge with the Florida Commission on Human Relations ("FCHR") after filing their charges with EEOC. Sixty days have elapsed since the filings were made at EEOC and FCHR.

IV.

Facts

9. In 1991, the United Faculty of Florida and Florida Board of Regents entered into a collective bargaining agreement which provided for in Article 23.1(b)(3) "Market Equity/Compression" adjustments ("market adjustments") to the salary of eligible employees of the State University System. Article 23.1(b)(3) states:

> (3) Market Equity/Compression Increase. After the increases in (a), (b)(1), and (b)(2), above are implemented, the salary rate of ranked faculty members and librarians *shall additionally be increased by the amount necessary to bring it up to 80 percent of the 1989-90 Oklahoma State University/Association of Research Librarians Survey mean salaries,* based upon the employees' 1991-92 rank and discipline. (Emphasis added)

(Attached hereto as Exhibit A).

10. The market adjustments were intended to equalize the salaries of long-time employees of the Defendant whose previous yearly raises did not adequately reflect the market value of the services provided by such employees commensurate with their experience and when compared with employees more recently hired.

11. Funds were initially provided by the Florida Legislature for the market adjustments during the 1991-92 fiscal year, but were subsequently withdrawn. This withdrawal of funds was found unlawful by the Florida Supreme Court in March 1993, and these market adjustments were disbursed to all eligible employees in August 1993.

12. During the 1992-93 fiscal year, while the litigation was pending before the Florida Supreme Court, the Legisla-

ture maintained faculty salaries at the same level that it believed it had established for the 1991-92 fiscal year, after rescinding the original appropriation, resulting in an effective decrease in faculty salaries from the level originally funded and ultimately paid for the 1991-92 fiscal year.

13. The decrease in the salaries of individuals eligible for the market adjustment was significantly more than severe than those not eligible for the adjustment.

14. The legislative appropriation for fiscal year 1993-94 included funds for use at the discretion of Defendant which were sufficient to fund the market adjustment for the 1993-94 fiscal year.

15. On or about May 6, 1993, Associate Vice Chancellor, James J. Parry, acting on behalf of the Defendant Board of Regents, notified United Faculty of Florida as the certified bargaining agent of State University System faculty, including Plaintiffs, that the Defendant would not require administrators at Florida State University ("F.S.U."), Florida International University ("F.I.U.") and all other universities in the State University System to allocate available funds to provide the market adjustments to eligible individuals, including Plaintiffs, for fiscal year 1993-94.

16. Without the express directive from the Defendant Board of Regents to allocate funds for the market adjustment, F.S.U. and F.I.U. refused to allocate the available funds to continue to pay eligible individuals, including Plaintiffs, the market adjustment.

17. On November 22, 1993, the Defendant Board of Regents sustained F.S.U.'s and F.I.U.'s refusal to make the market adjustments permanent.

18. Six of the nine universities governed by Defendant used available discretionary funds to permanently adjust the base pay of faculty eligible for the market adjustment.

19. Defendant has continued to refuse to adjust Plaintiffs' base salaries to include the market adjustments notwithstanding the availability of such funds for fiscal years 1994-95 and 1995-96.

20. F.S.U.'s and F.I.U.'s decisions to not provide eligible individuals with the market adjustment using available funds has adversely affected Plaintiffs' base pay.

21. Defendant's continued refusal to provide full market adjustments to Plaintiffs during the 1993-94, 1994-95 and 1995-96 fiscal years has adversely affected their salaries and benefits of employment, widened the inequities in their pay relative to the market and more recently hired faculty and librarians, and has had a disproportionate impact on Plaintiffs.

22. Individuals most likely to be eligible for the market adjustment are employees with the most years of service at F.S.U., F.I.U. and other universities in the State University System, who are disproportionately older employees of Defendant.

23. As a result of Defendant's decision to not provide Plaintiffs with the market adjustment, Plaintiffs have sustained damages, including, but not limited to the following:

a. Lost wages;

b. Loss of other employment benefit.

V.

Claims for Relief

COUNT ONE—ADEA

24. Defendant's failure to provide the market adjustment has resulted in a disproportionate impact upon employees, such as Plaintiffs, who are 40 years of age or older, in violation of Section 623(a)(1) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), thereby entitling Plaintiffs to relief.

25. Defendant's failure to provide Plaintiff with the market adjustment beginning with the 1993-94 fiscal year was an intentional act of age discrimination in violation of Section 623(a)(1) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), thereby entitling Plaintiffs to relief.

COUNT TWO—FLORIDA HUMAN RIGHTS ACT

26. The allegations of Paragraphs 1 through 25 are realleged and incorporated as though fully set forth herein.

27. The disproportionate impact upon older employees likewise entitles Plaintiffs to the relief set forth below pursuant to Chapter 760, *Florida Statutes* (1993), as a pendent state law claim.

28. The disparate treatment of age discrimination against Plaintiffs entitles Plaintiffs to the relief set forth below pursuant to Chapter 760, *Florida Statutes* (1993), as a pendant state law claim.

29. The events giving rise to Plaintiffs' claim under Chapter 760, *Florida Statutes* (1993) arise from the same core of facts giving rise to the claim stated in Count One of this Complaint.

WHEREFORE, Plaintiffs pray that this Court render judgment in their favor for:

1. Relief in the form of an award of back pay and other lost employment benefits from the dates of discriminatory acts by Defendant to the date of judgment.

2. An award of liquidated damages pursuant to 29 U.S.C. § 626(b) in an amount equal to the total back pay and benefits award for the willful violation of the ADEA by the Defendant.

3. Permanent base salary adjustments, as appropriate, to Plaintiffs' salaries to include the market adjustment illegally denied by Defendant.

4. An award of costs and attorney's fees associated with this action.

5. Such other relief as the Court may deem proper.

VI.

Demand for Jury Trial

Plaintiffs respectfully demand a trial by jury on all issues so triable.

Respectfully submitted,

MEYER AND BROOKS, P.A.
2544 Blairstone Pines Drive
Post Office Box 1547
Tallahassee, Florida 32302
(904) 878-5212

By: /s/ Thomas W. Brooks
THOMAS W. BROOKS
Florida Bar Number: 0191034
Attorney for Plaintiffs

(Certificate of Service Omitted in Printing)

ARTICLE 23

SALARIES

23.1 General Faculty Pay Plan. The Board shall provide employees in the General Faculty pay plan, except for Developmental Research School employees (see Section 23.10, below), with the following increases from funds equal to three (3) percent of the June 30, 1991, salary rate of these employees:

(a) Across-the-Board Increases. The annual salary rate of each eligible employee shall be increased by 1.5%.

(b) Other Salary Increases. The remaining portion of the three (3) percent salary increase funds shall be provided as follows:

(i) Promotion Increases. Prior to making allocation of promotion awards, the appropriate administrator should consider recommendations which may have been made through the collegial system of shared governance. Promotion increases shall be granted to full-time employees in the following amounts (proportional increases shall be granted to part-time employees):

To Assistant Professor, Associate in ———, and Assistant University Librarian—$1,000 or 3.5% of the employee's 1990-91 base salary rate, whichever is higher;

To Associate Professor, Research Associate, Associate Curator, Associate Scholar/Scientist, Associate Engineer and Associate University Librarian—$1,500 or 5.25% of the employee's 1990-91 base salary rate, whichever is higher; and

To Professor, Curator, Scholar/Scientist, Engineer, and University Librarian—$2,500 or 8.75% of the employee's 1990-91 base salary rate, whichever is higher.

(2) Salary Equity Adjustments. Salary adjustments required by Section 240.247, Florida Statutes. The procedures for conducting the Salary Equity Study are described in Section 23.4.

(3) Market Equity/Compression Increase. After the increases in (a), (b)(1), and (b)(2), above are implemented, the salary rate of ranked faculty members and librarians shall additionally be increased by the amount necessary to bring it up to 80 percent of the 1989-90 Oklahoma State University Association of Research Librarians survey mean salaries, based upon the employees' 1991-92 rank and discipline.

(4) Discretionary Salary Increases. Funds which remain after the distribution of funds as described above shall be distributed to employees as discretionary increases. Each university may, at its option, use discretionary funds to provide salary increases to employees pursuant to Article 23.5, Merit Criteria.

a. Prior to making allocations of discretionary increases, the appropriate administrator should consider recommendations which may have been made through the collegial system of shared governance. The administrator retains the right to make the final decision concerning the allocation of such increases.

b. Complaints with respect to the amount of, and procedures leading to, the allocation of salary increases under Article 23.1(b)(4) shall not be grievable, except as they pertain to allegations of unlawful discrimination under Article 6.

23.2 Administrative and Professional Pay Plan. The Board shall provide employees in the Administrative and Professional pay plan with the following increases from funds equal to three (3) percent of the June 30, 1991, salary rate of these employees:

(a) Discretionary Salary Increases, including promotions.

(1) Prior to making allocations of discretionary increases, the appropriate administrator should consider recommendations which may have been made through the collegial system of shared governance. The administrator retains the right to make the final decision concerning the allocation of such increases.

(2) Complaints with respect to the amount of, and procedures leading to, the allocation of salary increases under Article 23.2(a) shall not be grievable, except as they pertain to allegations of unlawful discrimination under Article 6.

(b) Salary Equity Adjustments. Salary adjustments required by Section 240.257, Florida Statutes. The procedures for conducting the Salary Equity Study are described in Section 23.4.

23.3 Salary Increase Increments. No increases provided to full-time employees under Section 23.1(b)(4) shall be less than $300; a proportional minimum amount shall be provided to part-time employees.

23.4 Salary Equity Study. The procedures for conducting the 1991-92 Salary Equity Study required by Section 240.247, Florida Statutes, shall include:

(a) Self-Study.

(1) Notification. No later than October 1, each university President shall notify employees of the procedures adopted by the university to conduct the salary study. The notification shall include the following statement: "In any year, an employee may seek to resolve a salary inequity due to discrimination based on race or sex either by filing a grievance under Article 6—Nondiscrimination

—or by conducting a salary equity study according to this procedure. But the employee cannot do both."

(2) Pursuant to notification, as provided in (1), above, an employee who perceives that the factors of race or sex may have affected the employee's salary may request a meeting with the department chair (or dean or director where an administrative unit is not organized along departmental lines) to review salary data and to request assistance in preparing the employee's salary study. The employee may be assisted by a colleague, or by a representative of the UFF, at this and all subsequent meetings. The employee may notify the local UFF Chapter of the intent to conduct a salary equity self-study. The administrator shall provide reasonable assistance to the employee, including copies of available documents that the employee may request, excluding those documents that are evaluative in nature and thereby protected from access under Article II of this Agreement and Section 240.253, Florida Statutes.

(3) No later than February 7, employees may present the results of their completed studies to the appropriate dean or comparable administrator, as designated by university procedures. After providing for the review of the study, the dean, or comparable administrator, will indicate in wrting to the employees whether a salary adjustment is recommended. This notification shall be provided within 21 days following the receipt of employees' completed studies.

(4) If an employee does not agree with the recommendation of the dean or comparable administrator, the employee may request that the matter be referred to the appropriate vice president for review.

(5) If the employee does not agree with the recommendation of the Vice President, the employee may re-

quest that the matter be referred to an appeals committee appointed by the President. The recommendation of the appeals committee shall be submitted to the President. In all cases, the President or designee shall make the final decision to approve or deny a salary adjustment.

(b) Administrative Review.

(1) Each university shall conduct an administrative review of salaries to ensure that any significant differences in the salaries of female and minority employees, when compared with those of male and white employees, respectively, are attributable to factors other than race or sex. The university shall ensure that the data used in the review are accurate. The administrative review shall consist of a statistical analysis and an administrative salary analysis as described in paragraphs (2) and (3), below.

(2) Statistical Analysis. Each university shall use a statistical model, to review the salaries of all full- and part-time ranked faculty in class codes 9001-9004. Each university may include other comparable ranked faculty classes in the statistical analysis. The universities shall use the statistical model in Appendix "F" as a framework for analysis, adopting it as appropriate to each university. The university's model, and the ranked faculty classes to be included in the statistical analysis, shall be provided to the UFF Chapter no later than October 1 for review prior to the university's conducting such analysis. The Chapter shall provide written comments regarding the model to the university within two (2) weeks after the model has been transmitted to the Chapter. Salaries of female and minority employees that are more than one (1) standard deviation below the salaries predicted by the statistical model shall be reviewed further, as discussed in paragraph (3) below. Female and minority employees included in the analysis whose salaries are more than one

(1) standard deviation below the predicted value shall be notified by December 1 and offered the opportunity to conduct a self-study. A list of all such employees shall be provided to the local UFF Chapter by December 1.

(3) Administrative Salary Analysis. The salaries of female and minority employees, including those identified through the statistical model, shall be reviewed by appropriate administrators to ensure that existing significant salary differences are attributable to factors other than race or sex. In cases where the salaries of female and minority employees are identified through the statistical analysis but are not subsequently recommended for equity adjustments, the appropriate administrator shall indicate in writing the factors, other than sex and race, to which the differences are attributable.

(c) The President shall report the results of the Salary Equity Study to the Chancellor and the UFF Chapter President at that university on or before May 15, or as soon thereafter as possible. The results shall be presented to the Board of Regents at its September meeting.

(d) A salary equity adjustment awarded to an employee shall be effective on the same date as other salary increases awarded the employee for the next academic year. The amount of the salary equity adjustment shall be to remedy an inequity based on race or sex existing during the academic year in which the employee's self study is submitted. Receipt of a salary equity adjustment shall have no effect on eligibility for merit or discretionary increases.

(e) In any year, as an alternative to participating in the Salary Equity Study, an employee may seek redress of salary discrimination under Article 6.2 of this Agreement by filing a grievance pursuant to Article 20 no later than thirty (30) days after the date of the notification

issued under paragraph (a)(1), above. Pursuant to Article 20.2 of this Agreement, the results of the Salary Equity Study shall not be an act or omission giving rise to a grievance under Article 20, nor shall the above procedures be grievable.

23.5 Merit Criteria.

(a) The employees of each academic department or equivalent unit, and of administrative units within the library, shall develop and recommend written criteria and related evaluative procedures to be used by each university for the distribution of salary increase funds which the Board shall make available for the purpose of rewarding meritorious performance.

(1) Development or revision of merit criteria and related evaluative procedures shall be initiated by a secret ballot vote of a majority of at least a quorum of the employees eligible to participate in departmental/unit governance or of the employees in administrative units within the library, or upon the initiation of the appropriate administrator.

(2) The appropriate administrator shall discuss these procedures, and the mission and goals of the department/unit and the university, with the department/unit employees who are to participate in the process.

(3) Each department/unit shall recommend merit criteria and related evaluative procedures, or revisions thereof, by a secret ballot vote of a majority of at least a quorum of the employees eligible to participate in departmental/unit governance or of the employees in administrative units within the library. These criteria shall be written standards of performance and shall be the sole basis upon which administrators shall award merit salary increases. The effective date of any revisions to criteria shall be determined in the same manner.

(4) Departments/units are encouraged to exchange and discuss drafts of their merit criteria and related evaluative procedures during the formulation process.

(5) The proposed merit criteria, and related evaluative procedures or revisions thereof, shall be reviewed by the university President or representative to ensure that they meet the following conditions.

a. Compliance with the provisions of the BOR/UFF Agreement, State and Federal law, and the Florida Administrative Code. A copy of the relevant portions of State law and the Code shall be provided to each department/unit at the outset of the process. A copy of the BOR/UFF Agreement shall also be available at the outset for reference by the department/unit.

b. Consistency with the mission and goals of the university, the college, and the department/unit.

c. Consistency with the department's/unit's annual evaluation process, which shall be based upon assigned duties that may differ among employees.

If the university President or representative determines that the recommended criteria do not meet these conditions, the proposal shall be referred back to the department/unit within one month of receipt for reconsideration, with a written statement of reasons for non-approval. No merit salary increase funds shall be provided to a department/unit until its criteria have been approved by the university President or representative.

(b) Approved merit criteria and related evaluative procedures and revisions thereof, and any related recommendations, shall be kept on file in the department/unit office and at the college and university levels. Additionally, employees in each department/unit shall be provided

with a copy of that department's/unit's current merit criteria and related evaluative procedures.

(c) The procedures, recommendations, and decisions made pursuant to Article 23.5 are not grievable. Complaints regarding the review and approval of proposed merit criteria and related evaluative procedures under Sections 23.5(a)(1) and (5) above, may be filed by the UFF with the President or representative within thirty (30) days following the date on which the UFF knew or reasonably should have known of the act or omission giving rise to the complaint. The President or representative shall seek resolution of the complaint and shall respond in writing to the complaint within thirty (30) days after it is filed. If the complaint is not satisfactorily resolved by the procedure described herein, the UFF may file the complaint with the Chancellor or representative within thirty (30) days following receipt of the university's decision. The Chancellor or representative shall seek resolution of the complaint, and shall respond in writing to the complaint within thirty (30) days of its filing.

(d) Employees may discuss the initial recommendations for their merit salary increase with the person or committee which makes the initial recommendation. A review of the implementation of this section of the Agreement shall be the subject of a consultation at each university pursuant to Article 2.2 of the agreement.

23.6 Report to Employees. Each employee shall be sent a report, on the form-prescribed in Appendix "G", not later than two (2) weeks prior to the implementation of the salary increase. Upon request, employees shall be provided the opportunity to consult with the person or committee which makes the initial recommendations regarding salary increases.

23.7 Report to the UFF.

(a) Two reports of the distribution of all salary increases arranged by university (one (1) alphabetically and one (1) by discipline), identifying the employee and the amount received in each of the categories, shall be made available to the UFF no later than November 15 of each year. A copy of the reports for each university shall be placed in the main library, along with the documents prescribed in Article 7.

(b) In addition to the reports described in Section 23.7(a), no later than thirty (30) days after a pay period in which any salary increases are reflected, each university shall furnish the local UFF Chapter with a copy of a report of the distribution of all employee salary increases, arranged by department or equivalent unit, identifying each employee and the amount received in each salary increase category and specifying the mean and the median merit salary increases for each department or equivalent unit, college, and for the university. A copy of each department's portion of the report shall be placed on file in the department, available upon request to any employee of the department.

23.8 Eligibility for Salary Increases.

(a) General Faculty pay plan employees are eligible for salary increases as follows:

(1) Across-the-Board Increases (23.1(a))—employees hired June 30, 1991, or before shall receive this increase.

(2) Promotion Increases (23.1(b)(1))—employees hired January 2, 1991, or before are eligible for such increases.

(3) Salary Equity Increases (23.1(b)(2)). Market Equity/Compression Increase (23.1(b)(3)), and Discre-

tionary Increases (23.1(b)(4))—employees are eligible for these increases regardless of hiring date.

(b) Administrative and Professional Pay Plan. Discretionary Increases (23.2(a)) and Salary Equity Increases (23.2(b))—employees are eligible for these increases regardless of hiring date.

23.9 Effective Dates for Salary Increases. Salary increases for General Faculty and Administrative and Professional pay plan employees shall be effective January 1, 1992.

23.10 Nothing contained herein shall prevent the Board from providing salary increases beyond the increases specified above.

23.11 Contract and Grant Funded Increases.

(a) Nothing contained herein shall prevent employees whose salaries are funded by grant agencies from being allotted raises higher than those provided in this Agreement.

(b) Employees on contracts or grants shall receive non-discretionary salary increases equivalent to similar employees on regular funding, provided that such salary increases are permitted by the terms of the contract or grant. In the event such salary increases are not permitted by the terms of the contract or grant, or in the event adequate funds are not available, the Board or its representatives shall seek to have the contract or grant modified to permit such increases.

(c) Employees on contract or grants shall be eligible for consideration for discretionary salary increases equivalent to similar employees on regular funding, provided that such salary increases are permitted by the terms of

the contract or grant and provided further that adequate funds are available for this purpose in the contract or grant. In the event adequate funds are not available, the Board or its representatives shall seek to have the contract or grant modified to permit such increase.

23.12 Order of Salary Increases.

(a) General Faculty pay plan.

(1) Salary Equity—23.1(b)(2)

(2) Across-the-Board—23.1(a)

(3) Promotion—23.1(b)(1)

(4) Market Equity/Compression—23.1(b)(3)

(5) Discretionary—23.1(b)(4)

(b) Administrative and Professional pay plan.

(1) Salary Equity—23.2(b)

(2) Discretionary—23.2(a)

23.13 The Board shall provide Developmental Research School employees with the following increases:

(a) Developmental Research School/County Schedule Equity. The salaries of Developmental Research School employees (class codes 9016, 9017, 9018, and 9019) shall be increased to ensure that the 1991-92 salary rate of each employee is not less than the salaries provided to individuals by the county within which each Developmental Research School is located, based upon the degree and years of experience on the county's 1990-91 schedule.

(b) Minimum Increase. If the salary increase provided to an employee through 23.13(a), above, is less than

$300, that employee's salary rate shall be further increased to ensure that the total salary increase provided through 23.13(a) and 23.13(b) equals $300.

(c) Promotion Increases. Prior to making allocations of promotion awards, the appropriate administrator should consider recommendations which may have been made through the collegial system of shared governance. Promotion increases shall be granted to full-time employees in the following amounts (proportional increases shall be granted to part-time employees):

To Assistant University School Professor—$1,000 or 3.5% of the employee's 1990-91 base salary rate, whichever is higher;

To Associate University School Professor—$1,500 or 5.25% of the employee's 1990-91 base salary rate, whichever is higher; and

To University School Professor—$2,500 or 8.75% of the employee's 1990-91 base salary rate, whichever is higher.

(d) Salary Equity Adjustments required by Section 240.247, Florida Statutes. The procedures for conducting the Salary Equity Study are described in Section 23.4.

(e) Developmental Research School Supplements.

(1) Employees in Developmental Research Schools shall receive salary supplements for the approved activities, and in the amounts, described in (2) below, under the following conditions:

a. The activity must be assigned by the Director, who shall determine which activities are to be performed and to whom they will be offered; provided that such activity must be offered in sufficient time to allow voluntary acceptance or rejection;

b. The activity must involve duties which extend beyond the normal workday, or duties for which an appropriate reduction in regular professional duties assigned during the normal work day has not been made, consistent with Article 9.8;

c. Employees shall receive a separate salary supplement for each assigned activity listed in (2) below;

d. The amount of the annual salary supplements described in (b) below, shall be paid over the period each year for which the activity is assigned; and

e. Salary supplements are not to be included in the base salary rate upon which future salary increases are calculated.

(2) Salary supplements shall be provided as follows:

a. A $600 supplement shall be provided for the following activities:

Department chair
Student council/government advisor
Drama coach
Literary magazine sponsor
Faculty/club sponsor
Assistant coach
Division director/chair

b. An $950 supplement shall be provided for the following activities:

Cheerleader sponsor/coach
Newspaper sponsor
Yearbook sponsor
Head coach, junior varsity sports
Head coach, minor sports
Choral director

c. A $1,300 supplement shall be provided for the following activities:

Athletic director
Band director
Head coach, major sports

d. A salary supplement for an activity may be paid at the next higher rate than those described above if, in the judgment of the Director, such higher rate is justified by the extent of the duties involved; however, no supplement shall exceed $1,300.

(3) Supplements for activities other than those described above may be provided at the discretion of the university.

(f) Joint Appointments. DRS employees holding joint appointments with a department or unit in the university shall be eligible for any salary increases available to other part-time members of the bargaining unit in such department or unit of the university, with such increases appropriately pro-rated.

(g) Eligibility for Salary Increases. Developmental Research School employees are eligible for salary increases as follows:

(1) DRS/County Schedule Equity (23.13(a)), Salary Equity Increases (23.13(d)), and DRS Supplements (23.13(e)),—employees are eligible for these increases regardless of hiring date.

(2) Promotion Increase (23.13(c))—employees hired January 2, 1991, or before are eligible for this increase.

(3) Minimum Increase (23.13(b))—employees hired June 30, 1991, or before shall receive this increase.

(h) Effective Dates for Salary Increases. Salary increases for DRS employees shall be effective January 1,

1992, except for DRS Supplements which shall be paid over the period during which the activity is assigned.

(i) Order of Salary Increases.

(1) Salary Equity—23.13(d)

(2) DRS/County Schedule Equity—23.13(a)

(3) Minimum Increase—23.13(b)

(4) Promotion Increase—23.13(c)

(5) DRS Supplements—23.13(e)

(f) The provisions of Sections 23.4, Salary Equity Study, 23.6 Report to Employees, 23.7, Report to the UFF, and 23.11, Contract and Grant Funded Increases, shall apply to employees in the Developmental Research Schools.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

[Caption Omitted]

ANSWER TO THIRD AMENDED COMPLAINT, AFFIRMATIVE DEFENSES AND JURY TRIAL DEMAND

Defendant, Florida Board of Regents, by and through its undersigned attorney, files the following Answer, Affirmative Defenses and Jury Trial Demand to Plaintiff's Third Amended Complaint. The paragraphs of Defendant's Answer correspond to the consecutively numbered paragraphs of Plaintiff's Third Amended Complaint.

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. Admit.
6. Admit
7. Admit.
8. Deny.
9. Deny.
10. Deny.
11. Deny.
12. Deny.
13. Deny.

14. Deny.

15. Deny.

16. Deny.

17. Deny.

18. Deny.

19. Deny.

20. Deny.

21. Deny.

22. Deny.

23. Deny.

24. Deny.

26. Defendant realleges response to paragraphs 1 through 25 above.

27. Deny.

28. Deny.

29. Deny.

Prayer for Relief

1. Deny.

2. Deny.

3. Deny.

4. Deny.

5. Deny.

AFFIRMATIVE DEFENSES

1. Res Judicata.

2. Collateral Estoppel.

3. Plaintiffs have made claims which are not actionable under the law and as such these are claims upon which relief cannot be granted.

4. Plaintiffs have failed to state any cause of action for which relief can be granted.

5. Plaintiffs have failed to exhaust their administrative remedies.

6. Plaintiffs have failed to fulfill conditions precedent which are required prior to filing their lawsuit.

7. Statutes of Limitations.

8. Business Necessity.

DEMAND FOR JURY TRIAL

Defendant demands a trial by jury on all matters so triable by law.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

/s/ Janice L. Jennings
JANICE L. JENNINGS
Assistant Attorney General
Florida Bar No. 0472352
DEPARTMENT OF LEGAL AFFAIRS
The Capitol PL-01
Tallahassee, FL 32399-1050
(904) 488-1573

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

[Caption Omitted]

PLAINTIFFS' TRIAL BRIEF

The Plaintiffs in the above-styled matter, J. Daniel Kimel, Jr., et al. (hereinafter referred to as "Plaintiffs") have invoked the jurisdiction of this Court under 29 U.S.C. § 621, *et seq.*, the Age Discrimination in Employment Act (hereinafter referred to as "ADEA" or the "Act"), and 28 U.S.C. § 1331, seeking to recover salary and benefits, and accrued interest thereon, in an amount sufficient to place Plaintiffs in the same position they would have been in had they been awarded salary compression increases in their base pay beyond each year after the 1991-92 fiscal year, liquidated damages, and attorney's fees and costs.

STATEMENT OF THE CASE AND OF THE FACTS

The Plaintiffs in this case are current or former faculty and librarians of Florida State University ("FSU") and Florida International University ("FIU") who are all over the age of 40 and have served as members of their respective departments for a longer period of time than other similarly employed individuals. Because the prevailing market rate must be paid to attract more recently hired faculty, who tend to be younger than Plaintiffs, the difference between the salaries of the newly hired employed and longer term employees widens, resulting in a

phenomenon called salary compression. In essence, the market value of Plaintiffs' services does not keep pace with the prevailing market rate which continues to rise as higher salaries are paid to new hires.

The problems resulting from salary compression were recognized and a provision in the collective bargaining agreement between Defendant and United Faculty of Florida provided for a salary increase for faculty and librarians identified to be suffering from this problem. However, during the 1991-92 fiscal year the Florida Legislature rescinded the funding that would have covered the market increases, which were challenged in a lawsuit filed by United Faculty of Florida. The litigation of this issue did not conclude until 1993 and the Legislature failed to appropriate sufficient funds to pay the market equity increases in the 1992-93 budget, although the increases were originally intended to be included in Plaintiffs' base pay beginning in the 1991-92 fiscal year. United Faculty of Florida prevailed in the lawsuit and Plaintiffs were awarded six months of the increase retroactive to the 1991-92 year. No funds were subsequently appropriated to restore fully the 1991-92 salary compression increases or the increases that should have been awarded during the 1992-93 fiscal year.

However, sufficient funds were provided in the 1993-94, 1994-95 and 1995-96 budgets for salary increases to be distributed at the discretion of Defendant to restore eligible faculty and librarians' salaries, including Plaintiffs, and would have placed Plaintiffs in the position they would have been in had the 1991-92 salary compression increases been continued in their base pay.

Despite the provision of sufficient funds from Defendant to the nine universities in the State University System to award market pay increases, the management at FSU and

FIU decided not to use the available discretionary funds to restore the salary compression increases of Plaintiffs and other similarly situated individuals. The decision not to restore the increases has had a statistically disproportionate impact upon employees such as Plaintiffs who are over 40 years of age and have contributed the most years of service to their universities. Plaintiffs challenge this decision not to restore the salary compression increases as violative of Section 623(a)(1) of the ADEA.

ARGUMENT I

PLAINTIFFS' DISPARATE IMPACT CLAIM FOR FAILURE TO AWARD MARKET EQUITY PAY INCREASES

In cases brought under the ADEA it is the burden of the Plaintiffs to prove that age was a determinative factor in the adverse action taken by the employer. *Verbraeken v. Westinghouse Electric Corp.*, 881 F.2d 1041, 1045 (11th Cir. 1989). Such proof may be made either by direct evidence of discriminatory intent, or, by offering statistical evidence of discrimination or circumstantial evidence from which the finder of fact may infer discriminatory intent. *Verbraeken*, 881 F.2d at 1045; *MacPherson v. University of Montevallo*, 922 F.2d 766, 770-71 (11th Cir. 1991). The statistical evidence is proven under the "disparate impact" theory and can be used to establish that a facially neutral employment practice, not justified by a legitimate business reason, has a disproportionately adverse impact on the members of a protected group (here, individuals over the age of 40). *MacPherson*, 922 F.2d at 771; *Hazelwood School District v. United States*, 433 U.S. 299, 306-09, 97 S.Ct. 2736, 2740-42 (1977). Discriminatory intent need not be proven by the Plaintiffs in a disparate impact case. *Allison v. Western Union Telegraph*

Company, 680 F.2d 1318, 1322 (11th Cir. 1982); ***Lester v. Ollin Corp.***, 50 F.E.P. Cases (BNA) 1468 (N.D. Fla. 1989).

To make out a *prima facie* case of disparate impact discrimination, a complaining party must prove, by a preponderance of the evidence, that a specific employment practice substantially and adversely impact upon a protected group to w ch the complaining party belongs. *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849 (1971). In determining whether the employment practice at issue has resulted in a disparate impact, both objective and subjective employment criteria utilized by the employer may be considered. *Watson v. Ft. Worth Bank and Trust*, 108 S.Ct. 2777, 2786 (1988).

If the disparate impact is proved, again through the use of statistical evidence, the burden then shifts to the employer to prove that the employment practice was 'job related" and prompted by business necessity." [1] In order to prove job relatedness and business necessity, the Defendant bears the burden of showing that its decision or practice is necessary to the operation of its business and

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[1] It should be noted that the Civil Rights Act of 1991 overruled the Supreme Court's decision in *Wards Cove Packing Company v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989), with regard to the Defendant's burden in proving job relatedness and business necessity. Congressional intent in this regard was to undo the harsh result against Plaintiffs brought about by the *Wards Cove* decision. *See* 42 U.S.C. § 1981 note. In so doing, Congress codified the disparate impact methods of proof enunciated by the Court in its earlier decision of *Griggs*, and is codified at 42 U.S.C. § 2000e-2(k). While this provision of the Civil Rights Act of 1991 expressly amends the disparate impact proof provision of Title VII of the Civil Rights Act of 1964, it is clearly intended to apply to anti-discrimination laws which have been modeled after and interpreted consistently with Title VII, including the ADEA. *H Rept No 120-40*, Part II, 5/17/91, p. 4. Thus, the *Griggs* analysis regarding the respective burdens in a disparate impact case now controls.

is related to successful performance of the job for which the practice is used. *Griggs*, 401 U.S. at 424, 91 S.Ct. at 854.[2]

Should a Defendant be successful in meeting its burden, the complaining party must be given an opportunity to show that other employment practices which would have had a lesser impact and effect would have served the employer's legitimate interest in competent performance of the job. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375 (1975).

Plaintiffs will establish their *prima facie* case through the use of expert testimony showing that the disparate impact in refusing to provide the market equity payment was statistically significant enough to meet Plaintiffs' initial burden. Evidence will be provided showing that while the traditional benchmark in demonstrating disparate impact for older workers suggests acceptable probabilities of one in twenty (two standard deviations) or one in one hundred (three standard deviations), as acceptable demonstrations that a protected group has been impacted more severely by a seemingly neutral business decision, the probabilities in the instant case are that of one in ten thousand.

Additionaly, without conceding that Defendant will meet its burden of showing that the decision not to award the market equity increases was job related and necessary to the operation of its business (indeed, Plaintiffs will attempt to show that it was not), Plaintiffs will have no difficulty

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2 Plaintiffs' statistical *prima facie* case must bear out at least a "marked disproportion," which is less than a "gross disparity." *Griggs*, 401 U.S. at 429, 91 S. Ct. at 852. Most courts have held that the *prima facie* case through statistics is met where the statistics exhibit a diparity of at least two standard deviations. *Rivera v. City of Wichita Falls*, 665 F.2d 531, 545, fn. 22 (5th Cir. 1982). This is often referred to as the "two standard deviation rule."

in showing that alternative methods were available to FSU and FIU to provide the market equity payments from the large pool of discretionary salary funds at both universities' disposal. Specifically, Plaintiffs will provide evidence showing that there were more than enough discretionary funds available to lessen the impact upon Defendant, either by providing the entire increase due each Plaintiff or a partial payment over time, to undo the compression problem.

ARGUMENT II

RELIEF AVAILABLE TO PLAINTIFFS FOR ADEA VIOLATION

Like Title VII, "the purpose of the ADEA is to make persons whole." *Gibson* v. *Mohawk Rubber*, 692 F.2d 1093, 1097 (8th Cir. 1982). Toward this end, prevailing Plaintiffs are entitled to more than simply back pay (*see* 29 U.S.C. § 626(b)) but should be "restored to a position where they would have been were it not for the unlawful discrimination." *Firefighters Local 1784* v. *Stotts*, 467 U.S. 561, 104 S.Ct. 2576 (1984) (describing "make-whole" remedial power in Title VII cases).[3]

Plaintiffs have brought this claim for, and are entitled to an award of back pay and fringe benefits in order to make them whole. Such is clear provided for in the Act itself. *See* 29 U.S.C. § 626(b). In addition, Plaintiffs may truly be made whole only if Defendant is ordered to permanently restore the market equity to Plaintiffs' base pay as was originally intended. Indeed, in order to truly remedy the compression problem suffered by Plaintiffs, this Court

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[3] Although the ADEA incorporates the remedial provisions of the Fair Labor Standards Act, it is clear that 29 U.S.C. § 626(b) provides for expanded remedies in ADEA cases. In this regard, the "make-whole" remedial purpose of the ADEA is similar to that of Title VII.

must order Defendant to bring Plaintiffs' salary up to the point where their compensation is more in line with their market value. Such is clearly within this Court's discretion and is part and partial of the "make whole purpose of the Act.[4]

ARGUMENT III

PLAINTIFFS' ENTITLEMENT TO LIQUIDATED DAMAGES

Where a wilful violation of the ADEA is shown, a Defendant may be ordered to pay liquidated damages of double the back pay award. 29 U.S.C. § 626(b). In addition, the fringe benefits associated with the back pay owed may also be doubled by a liquidated damages award. *Kossman* v. *Calumet County*, 849 F.2d 1027 (7th Cir. 1988). To prove entitlement to liquidated damages, wilfulness must be shown as an employer knowing, or showing reckless disregard for whether its conduct violated the ADEA. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 126, 105 S.Ct. 613, 625 (1985).

Plaintiffs will provide evidence at the trial in this cause showing that the statistically significant disparate impact resulting from the failure to award the market equity increase falls squarely within the wilfulness standard enunciated by the Court in *Trans World Airlines*. It will be shown that because of Defendant's previous recognition of the salary compression problem by providing for that

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[4] It should be noted that some of the Plaintiffs in this action have since retired, for which the permanent adjustment mentioned above would not be applicable. However, as part of this Court's ability to provide lost benefits under the ADEA, an order requiring Defendant to pay into said Plaintiffs' retirement fund that would increase their retirement benefits to reflect the market equity increase is wholly consistent with the purpose of the ADEA and within this Court's power.

relief in the collective bargaining agreement, that as soon as sufficient funds became available (during the 1993-94, 1994-95 and 1995-96 fiscal year), to provide the market equity payments that FSU and FIU's refusal to remedy the problem once it had the means to do so was either a knowing violation of the Act, or at the very least, showed reckless disregard for whether its conduct would disparately impact Plaintiffs in violation of the ADEA. Further evidence will be presented showing that Plaintiffs' collective bargaining representative, United Faculty of Florida, put Defendant on notice of the problem that would result if the market equity increases were not provided at the very time Defendant had the ability to provide the necessary adjustment to Plaintiffs' pay.

ARGUMENT IV

ATTORNEY'S FEES AND COSTS

A prevailing party in an action under the ADEA is entitled to recover reasonable attorney's fees and costs in addition to any judgment awarded for violations of the ADEA pursuant to 29 U.S.C. § 626(b). *Lewis v. Federal Prison Industries, Inc.*, 953 F.2d 1277, 1982 (11th Cir. 1992). The determination of the attorney's fees and costs is the same as that required for other attorney's fees matters, such as the Civil Rights Act of 1964 and the Fair Labor Standards Act.

Should Plaintiffs prevail in this matter, such an award is entirely proper.

ARGUMENT V

THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL ARE NOT APPLICABLE TO THIS ACTION

Defendant has raised the defenses of res judicata and collateral estoppel claiming that the Florida Supreme Court decision in *Chiles v. UFF*, 615 So.2d 671 (Fla. 1993), precludes litigation of Plaintiffs' age discrimination claim before this Court. However, both defenses are wholly inapplicable to the federal law question of whether Defendant's decision to not award the market equity pay increases had a disparate impact upon Plaintiffs in violation of the ADEA.

In testing whether the doctrines of res judicata and collateral estoppel apply to litigation of a federal claim, the issue is whether the state courts would give preclusive effect to the ruling at issue. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883 (1982). With respect to the collateral estoppel defense, Florida law on the subject was summarized by the Florida Supreme Court in *Mobil Oil Corporation v. Shevin*, 354 So.2d 372 (Fla. 1978):

> Collateral estoppel, or estoppel by judgment, is a judicial doctrine which in general terms prevents *identical parties* from relitigating issues that have previously been decided between them. The essential elements of the doctrine are that the *parties and issues be identical*, and that *the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction.*

Shevin, 354 So.2d at 374 (footnotes omitted).

The test for determining the applicability of res judicata defense was defined as follows:

> Several conditions must occur simultaneously if a matter is to be made res judicata: identity of the thing sued for; identity of the cause of action; identity of parties; identity of the quality in the person for or against whom the claim is made . . . It is also a settled rule that when the second suit is between the same parties but based upon a different cause of action from the first, the prior judgment will not serve as an estoppel except as to those issues actually litigated and determined in it.

Albrecht v. State, 444 So.2d 8, 12 (Fla. 1984).

Application of the tests espoused in *Shevin* and *Albrecht* clearly dictate that Defendant's assertion of these defenses is misplaced and should be rejected. Simply put, the parties in the *Chiles* litigation Defendant cites as applicable to both defenses were entirely different from the parties in the instant action. In *Chiles*, the United Faculty of Florida brought an action in conjunction with the American Federation of State, County and Municipal Employees, the Florida Police Benevolent Association, and the Federation of Physicians and Dentists, against the Governor in his official capacity.

Additionally, the dispositive issue in *Chiles* was whether the Legislature violated Article I, Sections 6 and 10 of the Florida Constitution in failing to provide pay raises in the face of a budget shortfall. *Chiles*, 615 So.2d at 672. On that issue, the Court held that the Legislature has the authority to reduce previously approved appropriations and not offend state constitutional law principles if it has a compelling state interest in doing so. *Chiles*, 615 So.2d at 673. The issue for resolution in this case is one of age discrimination under the ADEA. The issue

of age discrimination was not (and could not have been) litigated in the *Chiles* case.

Therefore, based on the tests announced in *Shevin* and *Albrecht*, Defendant's defenses of res judicata and collateral estoppel must fail. This Court should not give any credence to Defendant's arguments in support of these defenses.

ARGUMENT VI

ALL PRE-SUIT CONDITIONS AND LIMITATIONS PERIODS HAVE BEEN SATISFIED

Defendant has raised three defenses regarding pre-suit conditions which it claims have not been met prior to the institution of this lawsuit, all of which have no merit and should be rejected. First, Defendant avers that "the affirmative defense of statute of limitations is applicable given that the Plaintiffs have filed their claim more than 300 days beyond the date they knew or reasonably should have known of the alleged adverse employment action." (Answers to Interrogatories; Defendant's Answer to Third Amended Complaint, p. 3) Second, Defendant states that "the affirmative defense of exhaustion of administrative remedies is applicable given that most or all of the Plaintiffs have failed to avail themselves to the appropriate administrative forums for resolution of this salary claim, including the applicable BOR/UFF collective bargaining agreement." (Answers to Interrogatories; Defendant's Answer to Third Amended Complaint, p. 3) Third, Defendant has generally averred that "Plaintiffs have failed to fulfill conditions precedent which are required prior to filing their lawsuit." (Defendant's Answer to Third Amended Complaint, p. 3)

Regarding Defendant's statute of limitations defense, the 300 day limitations period was clearly met by the

filing of a charge with the Equal Employment Opportunity Commission by Plaintiff Kimel as a representative/class action charge on April 4, 1995. As will be shown at trial, the April 4, 1995, filing by Kimel was within 300 days after the date Defendant's own witness testified at deposition the Defendant notified Plaintiffs in August, 1993, of its decision to not restore the market equity increase. Thus, this defense is not applicable to this action and should be summarily rejected by the Court.

Likewise, Defendant's exhaustion defense should be rejected as well. The only administrative remedy that need be pursued prior to the filing of a federal lawsuit for age discrimination is that of the filing of an administrative charge with the Equal Employment Opportunity Commission and any state deferral agency. As previously noted, Plaintiff Kimel filed the appropriate charge on behalf of himself and others similarly situated, to which the other Plaintiffs have opted-in.[5] The state charges were filed more than sixty days prior to filing suit which satisfied the only other requirement.

There is no other exhaustion requirement applicable to Plaintiffs' lawsuit. Indeed, there is no duty to file a grievance prior to the maintenance of an action under the ADEA. In *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S.Ct. 1011 (1974), the Supreme Court held that in a Title VII [6] action an employee need not first exhaust the grievance-arbitration machinery prior to the maintenance of a federal lawsuit. The Court noted that:

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[5] In fact, several Plaintiffs, Burton Altman, Bruce Grindal, J. Daniel Kimel, Jr., and Katherine Shelfer, filed separately with the Florida Commission on Human Relations.

[6] Though decided under Title VII, the *Alexander* rationale is equally applicable to an action under the ADEA, inasmuch as the substantive provisions of the ADEA "were derived *in haec verba* from Title VII." *Lorillard v. Ponds*, 434 U.S. 575, 584, 98 S.Ct. 866 (1978).

> We are also unable to acept the proposition that Petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different grounds, it concerns not majoritarian processes but an individual's right to equal employment opportunities . . . Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights could defeat the paramount congressional purpose behind Title VII.

Alexander, 415 U.S. at 51, 94 S.Ct. at 1021.

Plaintiffs are not unmindful of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991). However, Plaintiffs submit that *Gilmer* is inapplicable to the circumstances presented in this case.

In *Gilmer*, the Supreme Court announced that arbitration of employment discrimination claims was proper under the ADEA. However, the *Gilmer* decision is only applicable to situations where an employment contract [7]

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[7] Also, the *Gilmer* holding applies only to private, individual contracts and does not affect collective bargaining agreements, where the holding of *Alexander* still controls. *See Benstad Interstate/Johnson Lake Corp.*, 752 F.Supp. 1054, 1057 (S.D. Fla. 1990); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (10th Cir. 1992); *Bacashihua v. U.S. Postal Service*, 859 F.2d 402 (6th Cir. 1988).

contains express language waiving the litigation of all federal statutory rights.

Finally, it is not entirely clear what Defendant means in its claim that Plaintiffs failed to fulfill certain conditions precedent to the filing of this action. Plaintiffs can only assume that Defendant is referring to the fact that not all Plaintiffs filed a charge with the EEOC or Florida Commission on Human Relations. However, even if Defendant is making such a claim, it should be rejected by this Court.

It is well-established that the "single-filing" or "piggy backing" rule allows additional Plaintiffs to opt into a class or representative action by latching onto a timely charge filed by one of the named Plaintiffs. As was recently held by the Eleventh Circuit in *Grayson v. K-mart Corp.*, 9 F.L.W. Fed. C1003 (April 9, 1996), the piggy backing rule is applicable to ADEA cases so long as: (1) the relied upon charge to which the other Plaintiffs are utilizing is not invalid; and (2) the individual claims of the filing and non-filing plaintiffs arise out of the same discriminatory treatment in the same time frame. *Grayson*, 9 F.L.W. Fed. at C1007; *see also Mooney v. Aramco Service Co.*, 54 F.3d 1207, 1223 (5th Cir. 1995) (court states that federal courts universally recognize piggy backing rule).

As previously mentioned, Plaintiff Kimel filed his charges with the EEOC and the Florida Commission on Human Relations on his behalf and on behalf of other similarly situated employees of Defendant Board of Regents. Under the *Grayson* holding, such was all that was required for the non-filing Plaintiffs to join in this matter.

ARGUMENT VII

PLAINTIFFS WERE GIVEN NO OPPORTUNITY TO MITIGATE THEIR DAMAGES

Defendant has indicated that it will raise as an issue in this case Plaintiffs' failure to mitigate their back pay damages. Such an argument is futile for two reasons. First, Defendant has not until this late stage in the proceedings indicated its intention to pursue this argument. Indeed, Defendant's Answers do not raise the affirmative defense of mitigation, and Defendant did not put the mitigation defense at issue in discovery. Defendant cannot now raise the defense in the pre-trial documents filed with this Court.

Second, and more importantly, while a Plaintiff in an ADEA case does have a general duty to mitigate back pay and front pay damages, [*Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir. 1983) and *EEOC v. Prudential Federal Savings and Loan Association*, 763 F.2d 1166 (10th Cir. 1985), Plaintiffs could not mitigate their back pay awards in this case because Defendant would not provide the requested market equity pay increases and had no control over Defendant's refusal to provide the same. The only alternative for Plaintiffs was to make a request for the funds, which they did; and then try to force Defendant to provide the funds, which they have by filing this lawsuit.

Furthermore, the mitigation issue usually arises where a termination has occurred, where the Courts have imposed the affirmative duty to mitigate upon Plaintiffs to seek similar work to reduce the amount of damages they may be owed. *See, e.g., Nord v. United States Steel Corp.*, 758 F.2d 1462 (11th Cir. 1985). In the instant case, the Plaintiffs were not terminated, thus rendering futile any mitigation argument put forth by Defendant.

ARGUMENT VIII

PLAINTIFF DOUGHERTY IS A PROPER PARTY TO THIS ACTION

Defendant has also indicated that Plaintiff Dougherty is not a proper party to this action because his claim is barred by the doctrines of res judicata, collateral estoppel and accord and satisfaction. The Defendant claims that as a result of a grievance settlement between Dougherty and Defendant on October 23, 1991, that Dougherty has received all the relief to which he is entitled.

However, Plaintiff Dougherty fails to understand how the October 23, 1991, grievance settlement could possibly have any bearing on this case, since the action complained of in the instant suit (ADEA disparate impact discrimination) occurred some two years after the grievance settlement in the summer of 1993.

The grievance to which Defendant refers allege that:

> The University has discriminated against [Dougherty] on account of his handicap and alcoholism and that the University has not provided him with sufficient laboratory space, has not reappointed him as director of the Mass Spectrometry Laboratory, and has not provided him with appropriate salary increases.

The award given Dougherty as a result of the settlement was:

> A salary increase of $7,000.00 effective January 1, 1992. This increase includes all salary increases which are provided pursuant to the BOR/UFF collective bargaining agreement for the academic year 1991-1992, and shall be given without regard to whether legislative increases previously scheduled for January 1, 1992, are withdrawn or provided.

From the aforementioned, it is clear that Plaintiff Dougherty did not, nor could he have, complained of the issues in this suit during the 1991 grievance. The language of the settlement agreement quoted above does not contemplate in any way Dougherty's claim of age discrimination. The issues in the grievance being entirely different from the issues in this case, none of the three defenses Defendant will put forth in order to have Plaintiff Dougherty dismissed from this case are valid.

Respectfully submitted,

MEYER AND BROOKS, P.A.
2544 Blairstone Pines Drive
Post Office Box 1547
Tallahassee, Florida 32302
(904) 878-5212

By: /s/ Thomas W. Brooks
THOMAS W. BROOKS
Florida Bar No. 0191034

and

By: /s/ Robert J. Sniffen
ROBERT J. SNIFFEN
Florida Bar No. 0000795
Attorneys for Plaintiffs
Except for
Richard E. Glick

(Certificate of Service Omitted in Printing)

[Filed May 9, 1996]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Civil Action No: 5:96CV25

WELLINGTON N. DICKSON, a/k/a "Duke",
Plaintiff,

vs.

FLORIDA DEPT. OF CORRECTIONS JACKSON COUNTY, JACKSON CORRECTIONAL INSTITUTION, JIM FOLSOM, a/k/a JIM FOLSOM SUPERINTENDENT JACKSON COUNTY CORRECTIONAL INSTITUTION, JAMES EDWARD CHILDS, a/k/a MAJOR J.E. CHILDS,

Defendants.

COMPLAINT

COMES NOW the Plaintiff, Wellington N. Dickson, by and through his undersigned attorney and states and alleges as follows:

1. The plaintiff is, and at all times revelant to the actions complained of here has been, a resident of Marianna, County of Jackson, State of Florida, and presently resides at 2302 Hollister Road, Marianna, Florida 32446.

2. The defendant, FLORIDA DEPARTMENT OF CORRECTIONS, JACKSON COUNTY, is a corporation incorporated under the laws of the State of Florida, with their principal place of business in the State of Florida at the city of Tallahassee, and is also licensed to do busi-

ness in the City of Malone, County of Jackson, in the State of Florida.

3. The defendant JACKSON CORRECTIONAL INSTITUTION is a corporation incorporated under the laws of the State of Florida, with their principal place of business in the State of Florida at the city of Malone, County of Jackson, in the State of Florida whose mailing address is PO Box 4900, Malone, Florida 32445.

4. Defendants JIM FOLSOM, a/k/a JIM FOLSOM SUPERINTENDENT JACKSON COUNTY CORRECTIONAL INSTITUTION, JAMES EDWARD CHILDS, a/k/a MAJOR J.E. CHILDS are agents of JACKSON CORRECTIONAL INSTITUTION and are employers as defined in Title 29 U.S.C. §§ 630(b)(1).

5. At all times relevant to the actions complained of here, the defendants were persons in an industry affecting commerce employing 20 or more persons for each working day in each of 20 or more calendar weeks in the current or preceding year thus meeting the definition of "Employer" under Chapter XIV of Title 29 U.S.C. § 630(b).

6. Jurisdiction of this action is brought pursuant to the Civil Rights Act of 1964 (Title 42 U.S.C. § 1981a); the Age Discrimination in Employment Act [Title 29 U.S.C. §§ 621-634]; and the Americans with Disabilities Act of 1990 [Title 42 U.S.C. § 12112(b)(5)(A)] for damages based on the unlawful employment practices committed by defendant(s) and is invoked pursuant to 28 U.S.C. §§ 1331 and 1337, and 29 U.S.C. §§ 216(b), 626(b) and (c); Title 42 U.S.C. §§ 12117(a).

7. On or about October 25, 1994, Plaintiff filed a charge of discrimination with the Florida Commission on Human Relations alleging that he was discriminated against based upon age and handicap, and was assigned case number 95-J046. At approximately the same time

Plaintiff filed a charge with the Equal Employment Commission and was assigned Charge Number 15D950059, thereby satisfying the requirements of Title 42 U.S.C. § 2000e-5(b) and (e); and Title 42 U.S.C. § 12117.

8. Such charge was filed within one hundred and eighty (180) days of the unlawful employment practice. On September 28, 1995, Plaintiff requested a right to sue letter. On or about February 9, 1996, less than 90 days prior to the filing of this complaint, the Equal Opportunity Commission issued to Plaintiff a notice of Right to Sue with respect to such charge of discrimination on the basis of age and handicap.

9. The incidents described below were part of a continuing series of incidents of discrimination and harassment which began on or about May 1991 to the present and which constitute a continuing violation of the Plaintiff's Title VII rights civil rights under Section 1981a et seq., and Chapter 126 rights protected under Title 42 United States Code.

GENERAL ALLEGATIONS

10. Plaintiff reincorporates by reference each and every allegation in paragraphs 1 through 9 above.

11. On or about December of 1986, Plaintiff graduated as a certified corrections officer from Washington Holmes Vo-Tech School in Chipley, Florida. Also, Plaintiff applied for, and was given a position as a corrections officer at Apalachee Corrections Institution [hereinafter ACI] in Sneads, Florida, in December of 1986.

12. Promotions at ACI were few and far between for older Northerners, and Plaintiff felt the chance for promotions might be more favorable elsewhere. On or about October of 1990, Plaintiff found out that there was going

to be a new state corrections facility built in Malone, Florida, and that it was to be named Jackson Correctional Institution. Plaintiff called and spoke to Defendant Major Childs about obtaining a position at the new corrections facility Jackson Correctional Institution, [hereinafter JCI]. Major Childs informed Plaintiff that he was indeed hiring personnel, and told Plaintiff to come fill out an application, and go through the interview process if he wanted a job.

13. Plaintiff, Lee Blaylock, who was a fellow corrections officer at ACI, and Curly Pittman, also working at ACI, went to see Major Childs, and each applied for jobs. During the interview process, Major Childs responded, when asked about promotions, that based on Plaintiff's and his co-applicants' qualifications that he foresaw each of them being promoted to Class Title Correctional Officer Sergeant within 6 months to a year.

14. Plaintiff was accepted for and was hired as a corrections officer at JCI on December 14, 1990. Plaintiff has construction experience and assisted in the building phase of JCI. Plaintiff was one of 23 corrections officers hired to build the corrections facility in Malone, Florida.

15. On or about May 1991 and September 1991, the Plaintiff learned that certain Sergeant's positions within the organization at Jackson Correctional Institution were opening up for promotion. On or about July 1, 1991, on the midnight shift, Plaintiff was working both inside and outside patrol, carrying much of the patrol load himself. At around July 1, 1991 at 5:30 a.m., Plaintiff began experiencing a shortness of breath, cold sweats, tightness in his chest, and having a difficult time breathing. Plaintiff reported this to his supervisor Lt. Marvin Pilcher, stating that he did not feel good, and describing his other symptoms. Lt. Pilcher then requested that Plaintiff go and sit

in the gate house and count the inmates as they passed through for chow. Plaintiff did so until 7:00 a.m., when his shift ended. Plaintiff went home, told his wife that he didn't feel good, had another chest pain, and shortness of breath, and was promptly taken to a hospital.

16. At around noon, Plaintiff's wife went back home and called Major Childs to inform him that Plaintiff had a mild heart attack, was at the hospital, and would not be coming in for his next shift on doctor's orders. Plaintiff's wife specifically asked Major Childs to inform Plaintiff's supervisor so that she would not be called when she was trying to sleep in the early hours of the morning when Plaintiff did not show up for his scheduled shift. Plaintiff's wife was called anyway when Plaintiff didn't show up for his shift, because the message was not relayed. She told the caller that Major Childs must not be very good at running the prison, if he couldn't relay a simple message. Major Childs told Plaintiff when he later returned to work that he had heard about her comment. Childs opined to Plaintiff that, "I have heard that your wife doesn't think that I am very competent." Plaintiff, responded that "Under the circumstances, I cannot blame her." From that point on, Plaintiff believes he was singled out for harassment and denial of promotions by Defendant Childs, because Defendant Childs had no power over Plaintiff's wife for her candid comments about him.

17. Plaintiff was in all ways qualified for the Sergeant positions, and was desirous of being promoted into one of the 4 or 5 vacant positions. On or about September 20, 1991, Plaintiff met with Major Childs and asked why he did not promote Plaintiff and discussed future opportunities within the company and was at that time advised that there were two younger people seeking positions within the company and that the company needed to promote

those persons to avoid the risk of those persons leaving the company.

18. On or about September 30, 1991, two Corrections Officer Sergeants positions within Jackson Correctional Institution were filled by Kipp Williams and Michael Baxter. Plaintiff was apparently not considered for those positions so that the positions could be filled by younger selectees. Kipp Williams and Kenneht Baxter, both younger and lesser experienced were promoted. Plaintiff inquired as to why he again had been passed over, and was told by Major Childs that: "You don't have enough bricks in your pocket." Plaintiff took the statement to mean that Plaintiff had not performed enough personal favors for Major Childs as did Baxter and Williams. They ran errands, and acted as Major Childs' valet. Kipp Williams' wife worked in the personnel office.

19. Written Guidelines have been promulgated for use in bestowing promotions to each job title, such as Correctional Officer Sergeant, Lieutenant, Captain, etc. . . Some of the factors include: education, performance appraisals, work experience, work history. The policy also states that affirmative action goals will be given consideration. In order to be considered for advancement, a selectee must submit an application once a year to have a current request for promotion before the promotions board at Jackson Correctional Institution. The application for advancement is good, once submitted, from May to June for one year. At all times relevant herein Plaintiff has always had a timely application for promotion submitted for consideration. The usual procedures of the promotion review committee were circumvented by the Defendants in order to allow for persons of a younger age to be promoted within the company and to discriminate against Plaintiff because of his age and disability.

20. Plaintiff was more qualified for the positions than those younger persons selected for promotion. At the

time the Plaintiff was not selected for the position in this instance, he was over the age of 58 a member of a protected class.

21. The younger more inexperienced electees in this instance were: Kipp Williams and Michael Baxter.

22. On or about February of 1992, the Plaintiff learned that Four or Five (4-5) certain Sergeant's positions within the organization at Jackson Correctional Institution were opening up for promotion.

23. Plaintiff was in all ways qualified for the Sergeant positions, and was desirous of being promoted into one of the Four or Five (4-5) vacant positions.

24. On or about February 20, 1992, Plaintiff met with Major Childs to discuss future opportunities within the corrections department [hereinafter company], and was at that time advised that there were younger people seeking positions within the company and that the company needed to promote those persons to avoid the risk of those persons leaving the company. Curly Pittmann, was one of the persons selected for a sergeant position, was younger and who had no college educational experience, and Plaintiff had about more Career Development courses (CD's) than Pittman.

25. On or about the end of February, 1992, the Four or Five (4-5) Corrections Officer Sergeant's positions within Jackson Correctional Institution were filled by younger less qualified selectees. Plaintiff was apparently not considered for those positions so that the positions could be filled by younger less qualified selectees.

26. Plaintiff was more qualified for the positions than those younger persons selected for promotion. At the time the Plaintiff was not selected for the open positions he

was over the age of 59 and was a member of a protected class.

27. In June 1992, Plaintiff resubmitted his yearly application for advancement for the following year. In June, 1992, there were Three (3) more CO Sergeants positions available. Plaintiff was never even allowed to interview for these positions. Danny Brock, with only one-and-a-half (1½) years experience received one of the CO Sergeants positions which was in Food Service. The other selectee promoted was John Stockton, who had two (2) years less experience than Plaintiff.

28. On or about June 1992, Plaintiff learned of three (3) Corrections Officer Sergeant's (hereinafter CO Sergeant's) positions open for advancement at Jackson County Correctional Institution.

29. On or about September of 1992, Plaintiff learned of four or five (4-5) CO Sergeants positions. Plaintiff was interviewed with selectees Corrections Officer [hereinafter CO] Messer, CO Lee Blaylock, who Plaintiff had transferred from ACI to Jackson Correctional Institution with, and CO Patsy Pope. Each of these individuals were younger and less qualified than Plaintiff, who was not promoted.

30. On or about August of 1993, after putting in an application for advancement in June of 1993, there were three (3) more CO Sergeants positions open. CO Gary Dean, and CO Terri Clarke who had been Colonel Childs' secretary were promoted along with CO Creel. Also, at the same time frame, in October of 1993, Plaintiff began re-experiencing the symptoms he had in 1991 during his heart attack. Plaintiff went to his Doctors, who, after an examination, later cleared him for limited duty. Plaintiff's doctor specifically gave orders that there should be no

climbing of towers. Major Childs told Plaintiff that he could climb towers or go home. No accommodation was given and Plaintiff lost income despite being available and willing to work.

31. Plaintiff was not considered, although desirous of a promotion, and each of the selectees were younger and less experienced. The factors for promotion were ignored in order to promote younger less experienced selectees.

32. In February of 1994, Plaintiff learned that seven (7) CO Sergeants positions had become vacant. Plaintiff was not considered for any of these positions so that younger less experienced selectees could be promoted. CO Michael May, who cooks for Colonel Child at his restaurant, received one of the positions. CO Alma Sequine, CO Myra Granger, CO V. Richardson, CO Beachum, and CO Mckinney, who is Colonel Child's cousin, were promoted.

33. In April of 1994, there were two or three (2-3) positions open for CO Sergeant. One went to CO Jerry Hicks, and was again younger and less experienced than Plaintiff.

34. In or about July 15, 1994, there were two positions for CO Sergeant open (Position number 24620 & 24733). Plaintiff was told that he was to get one of these positions. However, after the Lieutenant promotions on July 14, 1994, it was stated that Dickson [plaintiff] and CO T. Harris were to be promoted on July 15, 1994, and Major, now Colonel Childs said: "Not Dickson, he will not be promoted." Mr. Boyd, the Personnel Manager at Jackson Correctional Institution, at that time stated, "You can not justify that because Dickson was on top of the list for promotion." Plaintiff was not promoted.

35. In September, 1994, there were Three (3) positions open for CO Sergeant. Two of these went to CO Brown and CO O. Hearns. In October of 1994, two or three (2-3) CO Sergeants positions opened up and CO Toni Holmes, who had very little experience, and CO Ms. Pollack were given those positions. Plaintiff went to Colonel Childs to inquire why he was not promoted and was told that, "You don't have enough Career Development Courses [hereinafter CD's]." This was not true, because Plaintiff had many more CD's than either of the selectees promoted in September, and before.

36. On September 13, 1994, Plaintiff filed a grievance about the matter of promotions, and failure to accommodate Plaintiff's disability. The Police Benevolence Association (PBA) held a hearing and determined that the promotions process should be reconducted and Plaintiff given the next available CO Sergeant position.

37. In or about October 25, 1994, Plaintiff filed a grievance with the Florida Commission on Human Relations, and the Equal Employment Opportunities Commission, and the Police Benevolent Association (PBA), Plaintiff's union, claiming age discrimination. and disability discrimination in failing to promote & failing to accommodate Plaintiff's disability.

38. In or about mid-November, 1994, Plaintiff took the letters from his heart specialist and family doctor to his supervisors at Jackson Correctional Institution stating that he could come back to work, but could not climb the 60′ towers surrounding the prison, nor could Plaintiff perform heavy construction work. Plaintiff was told that unless he could perform the task of climbing the 60′

towers, Major Childs was not allowing Plaintiff to come back to work in any capacity.

39. Plaintiff asked his personnel manager and others at Jackson Correctional Institution: "I thought that under the Americans with Disabilities Act of 1990, that you have to make some accommodation to those with disabilities." No response was given at that time. Plaintiff was physically able to do every listed job required of a corrections officer, except climb the 60′ towers. Dr. Ready, Plaintiff's doctor, reviewed each task required of a corrections officer and found that Plaintiff could perform every one of the listed duties, except climbing 60′ towers and heavy construction.

40. Defendants refused to accept the Doctor's findings or letters and let Plaintiff come back to work. In or about November of 1994, when Defendants would not let Plaintiff return to work, Plaintiff notified Hal Johnson, an officer of the PBA, who went to work on helping Plaintiff obtain a disability accommodation pursuant to the Americans with Disabilities Act of 1990.

41. Hal Johnson contacted Laura Levy staff counsel for the Department of Corrections in Tallahassee who implied that the Americans with Disabilities Act did not apply to the Department of Corrections. After many hours of working with Defendant Jackson Correctional Institution, in an effort to allow Plaintiff to come back to work, Defendant finally agreed to allow Plaintiff come back to work. Plaintiff's absence from work was an extreme financial hardship.

42. During this time frame, Plaintiff used up his sick leave, annual leave, and compensatory leave. Plaintiff believes that he should have been placed on Administrative

leave since it was the Defendants who refused to allow an accommodation or to let Plaintiff return to work. Plaintiff upon reasonable belief feels that this was harassment against him to get even with his wife for having cast aspersions on Defendant Childs' leadership ability, and for filing complaints against Defendants.

43. Plaintiff returned to work in January of 1994. During 1994 there were four or five opportunities for promotion to CO Sergeant. Plaintiff interviewed each time but was passed over by younger less experienced electees each time. Mr. Boyd, the personnel manager kept telling Plaintiff to keep at it because he was right at the top of the list for promotion, and that they will give it to Plaintiff sooner or later.

RETALIATION/HARASSMENT FOR FILING GRIEVANCE FOR CONTINUED FAILURE TO PROMOTE

44. On or about January 15, 1995, the following Four (4) positions became available for CO Sergeant: 29377, 29376, 29375, 29374. Plaintiff was discriminated against on the basis of his age when Defendant Jackson Correctional Institution promoted CO Ronald Edenfield (5½ years experience), CO David Rabon (4 years experience), CO Abner Bowen (4 years experience), and CO Ronald Speets (6 years experience). In retaliation for having filed a grievance, Defendants Folsom and Childs did not bother to even consider Plaintiff for promotion, and promoted the aforementioned younger and less qualified selectees.

45. On or about February 15, 1995, Four CO Sergeant positions, 24717, 24623, 24674, 24675, became available. Plaintiff continued to follow all procedures for advancement, and was desirous of being promoted. Plaintiff was

not considered for these positions and was passed over for younger less qualified selectees: COs Toni Holmes, (3 years experience), Ms. Pollack (3 years experience), Mr. Foshey (5½ years), Mrs. Lawrence (8½ years).

46. On June 1, 1995, three CO Sergeant positions, 24719, 24661, 24658 became available. Plaintiff applied, was not considered, and was passed over for promotion so that younger less experienced selectees could be promoted so that they would not leave the corrections field. CO's Paramore, Kreese, and Butler received the CO Sergeant positions in retaliation for Plaintiff's having filed a grievance.

47. On September 1, 1995 Two (2) CO Sergeant positions, 24690, 24674, opened for filling. In retaliation for having filed a grievance, Plaintiff was passed over again for promotion for younger and less qualified selectees.

48. On October 1, 1995, CO Sergeant positions 33416, 33417 opened for filling. In retaliation for having filed a grievance, Plaintiff was again passed over by less qualified and younger selectees. Plaintiff was 62 years old at this time and was passed over for people under 40, so that they would not leave the corrections department. On October 18, 1995, Plaintiff was informed that COs Pat Edge and L. Powe were given the two available CO Sergeant's positions.

49. On or about March 15, 1996, CO Sergeant positions 24657, and 29377 became vacant. Plaintiff was desirous of being promoted, was qualified for promotion, but was denied and/or not considered so that younger less experienced selectees would not leave the corrections department. In retaliation for having filed a grievance, Defendants promoted Doris Michelle Porter (a black female with 4½ years experience and few CD's) and

Kenry Smith (white male with five (5) years experience and little or no CDs). Ms. Porter's mother was and still is a Jackson Correctional Institution nurse.

COUNT I

FAILURE TO PROMOTE BECAUSE OF AGE IN VIOLATION OF 29 U.S.C.S. §§ 621 ET SEQ.

50. Plaintiff readopts and realleges by reference the allegations found in ¶¶ 1-49, as though set forth in full herein. In or about July 15, 1994, there were two positions for CO Sergeant open (Position number 24620 & 24733). Plaintiff was told that he was to get one of these positions. Plaintiff had been promised by Major Childs to a promotion to CO Sergeant within six (6) months to one (1) year after coming to work at Jackson Correctional Institution.

51. Plaintiff was a member of a protected class, and told by Hinton Banks, personnel manager, that he was going to get one of these positions. Plaintiff was in all ways qualified for the positions, and was desirous of being promoted into one of the vacant positions. About half the time Plaintiff was scheduled to work from September of 1992 to this time, Plaintiff was required to perform the same duties as a CO Sergeant, but without the pay.

52. Written Guidelines have been promulgated for use in bestowing promotions to each job title, such as Correctional Officer Sergeant, Lieutenant, Captain, etc. . . Some of the factors include: education, performance appraisals, work experience, and work history. The policy also states affirmative action goals will be given consideration. The usual procedures of the promotion review committee were circumvented by the Defendants Florida Department of Corrections Jackson County, Jackson Correctional Institute, Jim Folsom, and Major J. E. Childs in order to

allow for persons of a younger age to be promoted within the company.

53. Plaintiff was more qualified for the positions than those younger persons selected for promotion. At the time the Plaintiff was not selected for the position he was over the age of 61.

54. The younger more inexperienced selectee in this instance was CO T. Harris.

Plaintiff demands a jury trial on all issues so triable.

WHEREFORE, Plaintiff respectfully prays that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institution, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institution to implement meaningful measures to ensure that the conduct of which has occurred in this case does not happen again.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attributable to age discrimination, or award Plaintiff front pay in the amount of $144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not un-

lawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of $140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of $160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

COUNT II

FAILURE TO PROMOTE BECAUSE OF AGE IN VIOLATION OF 29 U.S.C.S. §§ 621 ET SEQ.

55. Plaintiff realleges by reference all allegations in ¶¶ 1-49, and ¶¶ 50-54 as though set forth in full herein. On or about September 1, 1994, the Plaintiff learned that three (3) certain Sergeant's positions within the organization at Jackson Correctional Institution were opening up for promotion.

56. Plaintiff was in all ways qualified for the positions, and was desirous of being promoted into one of the three vacant positions, and reasonably believed that Defendant Childs would live up to his promise to promote Plaintiff to CO Sergeant.

57. On or about September 5, 1994, Plaintiff met with Major Childs and the promotions Board to interview for promotion to one of the three vacancies and to discuss future opportunities within the company and was at that time advised that there were three younger people seeking

positions within the company and that the company needed to promote those persons to avoid the risk of those persons leaving the company. Plaintiff was advised that he needed to obtain a few more Career Development courses (CD's). Plaintiff had taken CD courses and now had 11.

58. Throughout this time frame, Plaintiff was performing the duties associated with a Sergeant's position at least half of the time he worked, without Sergeant's pay.

59. On or about September 9, 1994 the three CO Sergeants positions within Jackson Correctional Institution were filled. Plaintiff was apparently not considered for those positions so that the positions could be filled by younger selectees.

60. Plaintiff timely filed a grievance. Plaintiff has performed all prerequisites and conditions precedent to filing this suit.

WHEREFORE, Plaintiff respectfully prays that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institution, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institution to institute meaningful procedure to prevent future similar conduct.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attribu-

table to age discrimination, or award Plaintiff front pay in the amount of $144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not unlawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of $140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of $160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

Plaintiff demands a jury trial on the above issues.

COUNT III

FAILURE TO PROMOTE BECAUSE OF AGE IN VIOLATION OF 29 U.S.C.S. §§ 621 ET SEQ.

61. Plaintiff readopts and realleges by reference all allegations in ¶¶ 1 through 60 above. On or about October 1, 1994, the Plaintiff learned that certain Sergeant's positions within the organization at Jackson Correctional Institution were opening up for promotion.

62. Plaintiff was a member of a protected class at age 61, and was passed over for promotion so that the selectees listed in ¶ 35, who are not members of Plaintiff's protected class, could be promoted because they were

younger and less experienced to keep them from leaving the corrections department.

63. Plaintiff was still performing duties that are normally performed by CO Sergeants at least half or more of all work shifts scheduled by the defendants. This assignment requires Plaintiff to perform Sergeant's duties without Sergeant's pay.

64. During November, 1994 when Plaintiff returned to work after his second heart attack, the defendants shorted Plaintiff's pay twice, causing Plaintiff to have to borrow money to meet his obligations such as his house payment. Plaintiff was forced to wait for his back pay and when it was finally remitted it was done in such a way as to be taxed at a higher rate causing Plaintiff further loss of income. Plaintiff reasonably feels that this was further retaliation for his having filed a grievance over defendant's age discrimination in promoting.

65. Plaintiff was in all ways qualified for the positions of CO Sergeant, and was desirous of being promoted into one of the two or three vacant positions.

66. On or about October 15, 1994 positions within Jackson Correctional Institution were filled as set forth in ¶ 32. Plaintiff was apparently not considered for those positions so that the positions could be filled by younger selectees.

67. The usual procedures of the promotion review committee were circumvented by the Defendants in order to allow for persons of a younger age to be promoted within the company.

68. Plaintiff was more qualified for the positions than those younger persons selected for promotion. At the time the Plaintiff was not selected for the position he was over the age of 61.

69. The younger more inexperienced selectees in this instance were: CO Brown, and CO O. Hearns. Plaintiff has performed all conditions precedent to bringing suit.

WHEREFORE, Plaintiff respectfully prays that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institution, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institution to institute meaningful procedures designed to prevent future similar conduct.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attributable to age discrimination, or award Plaintiff front pay in the amount of $144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not unlawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of $140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of $160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

Plaintiff demands a jury trial on all issues so triable.

COUNT IV

RETALIATION FOR FILING GRIEVANCE AGAINST DEFENDANTS BECAUSE OF AGE DISCRIMINATION FAILURE TO PROMOTE, SHORTAGE OF PAY, FAILURE TO ACCOMMODATE A DISABILITY WHICH WOULD NOT ADVERSELY AFFECT THE OPERATION OF THE INSTITUTION RESULTING IN LOSS OF PAY IN VIOLATION OF 29 U.S.C.S. §§ 623(d) AND TITLE 42 U.S.C. § 12112(5)(A)

70. Plaintiff readopts and incorporates by reference the allegations in ¶¶ 1 through 69 above as though set out hereinbelow in full.

71. Plaintiff, at all times relevant herein, was in all ways qualified for the position of CO Sergeant, and was desirous of being promoted into one of the vacant positions cited in Count III above.

72. Plaintiff, after having his requset for an accommodation due to his heart condition being unjustly refused, was finally allowed to return to work in November of 1994. Plaintiff's union and PBA representative met stiff unjustifiable and unlawful resistance from Defendants Folsom and Childs when they could not provide reasons for not making an accommodation to Plaintiff's disability. After his return to work, the defendants shorted Plaintiff's pay twice shortly before Christmas. Plaintiff's family suffered because there was not enough money for bills much

less Christmas as Plaintiff was shorted about twenty (20) hours pay.

73. Plaintiff went through proper procedure to rectify his pay problem but Defendant Florida Department of Corrections, when contacted, stated that it was Defendant Jackson Correctional Institution's problem, and refused to issue a check for Plaintiff's shorted pay.

74. Plaintiff and his family suffered economic hardship due to the defendants' retaliatory actions. Plaintiff was still forced to perform CO Sergeant's duties for Correctional Officers pay. Plaintiff worked hard to meet duties expected and performed beyond what was required. All of the above acts violate § 623(d) and Title 42 U.S.C. § 12112(5)(A).

75. All of the above acts by defendants, were the direct and indirect result of Defendant Florida Department of Corrections (FDC), and Jackson Correctional Institution's (JCI) failure to train and supervise Defendants Folsom and Childs. Knowledge of the unlawful behavior must be imputed to FDC and JCI due to the length of time the unlawful conduct took place, as well as learning of it through hearings conducted by Joe Cash of the Florida Commission on Human Relations.

WHEREFORE, Plaintiff respectfully prays that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institution, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institu-

tion to institute meaningful procedures to prevent and punish future similar conduct.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attributable to age discrimination, or award Plaintiff front pay in the amount of $144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not unlawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of $140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of $160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

Plaintiff demands a jury trial on all issues so triable.

COUNT V

FAILURE TO PROMOTE BECAUSE OF AGE IN VIOLATION OF 29 U.S.C.S. §§ 621 ET SEQ.

76. Plaintiff readopts and incorporates by reference the allegations in ¶¶ 1 through 75 above as though set out hereinbelow in full.

74. On or about January 15, 1995, through March 1996, the events as alleged in ¶¶ 44 through 75 took place. Thereafter, Jackson Correctional Institution promoted CO Ronald Edenfield (5½ years experience), CO David Rabon (4 years experience), CO Abner Bowen (4 years experience), and CO Ronald Speets (6 years experience) and many many more who were younger and less qualified than Plaintiff. In retaliation for having filed a grievance, Defendants Folsom and Childs did not bother to even consider Plaintiff for promotion, and promoted the aforementioned younger and less qualified selectees.

78. Defendants discriminated and retaliated against Plaintiff by refusing to promote, despite a promotion being promised as a condition of accepting the job as a corrections officer in the first instance, and helping to build the prison. Defendants benefitted and took advantage of Plaintiff's construction skills. For instance, Plaintiff discovered that toilets were being improperly installed and corrected the defect.

79. Plaintiff also discovered the lighting was being improperly hung. Plaintiff pointed out to his supervisors Folsom and Childs, that if they left the lights as they were, inmates could reach them to damage them, causing a security problem at night.

80. All of the above acts were done in a discriminatory manner, because Plaintiff was not granted promotion or given adequate consideration. Defendants again promoted selectees outside of the protected class who were less qualified and younger than Plaintiff.

81. All conditions precedent to filing suit have been performed, and this suit is timely filed.

WHEREFORE, Plaintiff respectfully prays that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institu-

tion, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institution to institute meaningful procedures designed to prevent and punish future similar conduct.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attributable to age discrimination, or award Plaintiff front pay in the amount of $144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not unlawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of $140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of $160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

Plaintiff demands a jury trial on all issues so triable.

COUNT VI

RETALIATION & DISCRIMINATION FOR FILING GRIEVANCE AGAINST DEFENDANTS BECAUSE OF AGE DISCRIMINATION FAILURE TO PROMOTE, RESULTING IN LOSS OF PAY IN VIOLATION OF 29 U.S.C.S. §§ 623(d) & TITLE 42 U.S.C. §§ 2000e-3(a)

82. Plaintiff readopts and incorporates by reference the allegations in ¶¶ 1 through 80 above.

83. Defendants' repeated failure to promote Plaintiff from January 20, 1996 through the present date, in light of PBA and Florida Human Relations Commission findings telling them to reconduct the promotion process and give Plaintiff the next available CO Sergeants can only be characterized as callous disregard and indifference to Plaintiff's civil rights.

84. The defendants acts and omissions in this complaint demonstrate that Defendants Florida Department of Corrections Jackson County, Jim Folsom, and Jackson Correctional Institution had knowledge of Defendant Childs' actions regarding the treatment of Plaintiff. The failure to correct or remedy the unlawful conduct when given the FCHR's finding and report of misconduct resulting from their hearing on June 9, 1995 show ratification of the unlawful acts.

WHEREFORE, Plaintiff respectfully prays that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institution, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institution to institute meaningful procedures designed to prevent and punish future similar conduct.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attributable to age discrimination, or award Plaintiff front pay in the amount of $144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not unlawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of $140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of $160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

Plaintiff demands a jury trial on all of the above counts.

Dated: 5/8/96

/s/ Donna K. Gardner
DONNA K. GARDNER
FBN 0879754
213 S. Alcaniz Street
Pensacola, Florida 32501
(904) 434-0810

Attorney for Plaintiff

[Filed Jul. 19, 1996]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 94-AR-2962-S

RODERICK MACPHERSON, *et al.*,
Plaintiffs

vs.

UNIVERSITY OF MONTEVALLO,
Defendant

MEMORANDUM OPINION

The court has before it the motion for partial summary judgment filed by defendant, University of Montevallo ("the University"). Plaintiffs, Roderick MacPherson ("MacPherson") and Marvin Narz ("Narz"), allege that the University is liable to them under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("the ADEA"), for retaliation, for a hostile working environment, for disparate treatment age discrimination and for disparate impact age discrimination. Plaintiffs also allege that the University trampled their right to engage in free speech in retaliation for engaging in acts protected by the ADEA. Because the University fails to persuade the court that no genuine issues of material fact exist with regards to most of these claims, the summary motion is due to be granted only in part.

I. Undisputed Facts

The court starts by adopting the parties' joint statement set forth in the court's pre-trial order of June 26, 1996, as follows:

> Plaintiffs Roderick MacPherson (YOB 1937) and Marvin Narz (YOB 1936) are employed by defendant University of Montevallo as faculty members in the College of Business ["the COB"]. Both hold the rank of Associate Professor. The Dean of the College of Business is Dr. William Word ["Word"], who has been the Dean since 1979. There are 13 faculty members (not including the Dean) in the College of Business.
>
> The plaintiffs first filed suit under the ADEA against the University in 1988. See *MacPherson v. University of Montevallo*, 922 F.2d 766 (11th Cir. 1991) ["*MacPherson I*"]. That case was resolved by a Settlement Agreement and Release signed by the plaintiffs on July 10, 1992.
>
> Thereafter, the plaintiffs filed this their second lawsuit on December 18, 1994.

MacPherson was hired by the University as an assistant professor in 1973 with the primary responsibility for teaching marketing. He was promoted to associate professor in 1980. Narz was hired by the University as an associate professor in 1978. Narz has never been promoted by the University. Both plaintiffs applied for promotion to full professor in 1993, 1994, 1995 and 1996. Word chaired the COB's promotion committee in each of these years.

Plaintiffs have repeatedly requested sabbatical leave since July 10, 1992. None of MacPherson's requests for sabbatical leave were granted. Although one of Narz's

requests was approved by Word, the cost of the leave was established by Word at $8,000. Due to the estimated cost of that sabbatical leave, this request was rejected by the University.

Plaintiffs have also requested appointment to university-wide and COB committees. Neither plaintiff has been appointed to such a committee since the early 1980s. Certain COB committees are responsible for course and faculty assignments within the COB.

After the settlement in *MacPherson I*, the University adopted the College and University Personnel Association ("CUPA") average salary standard, a new university-wide salary policy. Under CUPA, money can be channeled to one of the University's colleges to address individual salary differences if that college's average salary is below the national CUPA average. Because salaries as a whole in the COB exceed the national CUPA average, none of this channeled money has reached the COB for salary increases for COB faculty. Every member of the COB faculty is older than 40 years of age.

The agreement that settled *MacPherson I* included lump sum payments and salary increases as well as favorable class assignment guarantees for plaintiffs. In exchange, plaintiffs each signed the following release:

> Plaintiffs hereby fully release, discharge, and exonerate defendant University of Montevallo, its trustees, officers, agents, servants, and employees in their individual and official capacities, from any and all claims, demands, actions, causes of actions, judgments, costs, expenses, debts, or obligations of any kind and character whatsoever arising to date out of or relating to their employment which plaintiffs have, had, may have or may have had against the parties

> hereby released or which was or might have been claimed to be due plaintiffs from the parties hereby released.

Defendant's exh 20, at ¶ 6.

II. Analysis

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c). The inquiry when ruling on a Rule 56 motion is " 'whether the evidence presents a sufficient disagreement to require submission to [the trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.' " *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir. 1995) (*per curiam*) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The University concedes that genuine issues of material fact exist with regards to plaintiffs' claims of ADEA disparate treatment discrimination with regards to promotions, committee appointments and sabbatical leave.[1] The University, however, asks that summary judgment be granted in its favor as to the remainder of plaintiffs' claims.

A. ADEA Disparate Impact Discrimination

The University spends much of its effort arguing that there is no cause of action under the ADEA based upon a theory of disparate impact discrimination. Plaintiffs

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[1] See also section II.E, *infra*, regarding the University's apparent concession of the viability of plaintiffs' free speech claims.

direct the court's attention to *MacPherson I* for the proposition that the Eleventh Circuit has, in fact, recognized such a claim. In response the University argues:

> The plaintiffs present the court with the astounding representation that "the Eleventh Circuit has expressly adopted the disparate impact theory of recovery under the ADEA" in their first lawsuit. The depth of the plaintiffs' error measures the desperation of their argument. The Eleventh Circuit said nothing which could be interpreted that way.

Defendant's reply brief at 7.

This court also reads *MacPherson I*, specifically section III.A of that opinion, and it obtains not the foggiest idea how the University could seriously call plaintiffs "desperate." Upon considering these very same plaintiffs' appeal from a directed verdict in favor of the University on their previous disparate impact claim, the *MacPherson I* court devoted three plus pages to discussing *how* an age discrimination disparate impact claim could be *proved* and *refuted* and then said:

> Because we find that plaintiffs failed to meet their burden under a disparate impact theory of age discrimination, *we have assumed—without deciding—that a disparate impact claim of age discrimination can be made* where (as here) plaintiffs allege a practice that encompasses more than one point in the employment process. *We have also assumed—without deciding—that a disparate impact claim of age discrimination can be made* where (as here) plaintiffs allege a practice which is based on the market.

MacPherson I, 922 F.2d at 773 n.14 (emphasis added). This court finds that plaintiffs' reliance on *MacPherson I* for the proposition that an ADEA cause of action based

on disparate impact exists in the Eleventh Circuit is not all that far fetched. The truth is that the question remains undecided.

The University argues that whatever precedential value *MacPherson I* might have on this issue has been muted by the Supreme Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). The University argues that although *Hazen Paper* "did not shout 'No' to the question, it certainly whispered it loud enough for all to hear." *Defendant's reply brief* at 5. This court finds the University's reliance on *Hazen Paper* remarkable. In the words of the Supreme Court, the latest and greatest news on this question is: "By contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA, *and we need not do so here*." *Hazen Paper*, 507 U.S. at 610 (emphasis added). This is no more than an echo of *MacPherson I*.

The Supreme Court's explicit refusal to answer a question does not constitute precedent binding on this court.[2] Furthermore, this court is "not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." *Florida League of Professional Lobbyists, Inc. v. Meggs*, No. 95-2555, 1996 WL 341221, at *6 (11th Cir. July 9, 1996). Reading section III.A of *MacPherson I* as it does, this court agrees with plaintiffs that

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[2] The University also relies heavily in this portion of its argument on the concurring opinion of Justice Kennedy in *Hazen Paper*, where he stated "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Hazen Paper*, 113 S.Ct. at 1710 (Kennedy, J., concurring). This reliance is equally unpersuasive. A concurring opinion, like a "plurality opinion[,] is not binding on this Court." *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1523 (11th Cir. 1994), *aff'd*, 115 S.Ct. 1483 (1995).

the Eleventh Circuit hints strongly that a cause of action for disparate impact age discrimination under the ADEA exists. While this interpretation may indeed prove to be false when this action, or another like it, reaches the Eleventh Circuit and it is given a chance to state clearly its position on ADEA disparate impact theory,[3] for now this court will allow plaintiffs to proceed on the assumption that a cause of action does exist in the Eleventh Circuit, and therefore in this court, for disparate impact age discrimination under the ADEA.

Having assumed, along with the Eleventh Circuit, that a cause of action exists for disparate impact discrimination under the ADEA, the court must now determine whether plaintiffs have produced sufficient evidence to entitle them to go to trial on the question of disparate impact. "Under disparate impact theory, discrimination can be established by proving that a facially neutral employment practice, which is unjustified by a legitimate business goal of the employer, has a disproportionately adverse impact on the members of a protected group." *MacPherson I*, 922 F.2d at 771 (citing *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 655-56 (1989)). The *prima facie* case for disparate impact age discrimination requires plaintiffs to "isolate and identify" the employment practice they claim is responsible for the alleged statistical imparities. *Id.* Plaintiffs must not only be able

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3 The Eleventh Circuit appears to be in favor of allowing appellate courts, those courts with the authority to turn legal disputes into binding precedent, the opportunity to revisit past decisions in order to revise questionable/unclear positions. *See Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 52 F.3d 913, 916-17 (11th Cir. 1995) ("[w]here there is *any doubt* as to the application of state law, [the district] court should certify the question to the state supreme court to avoid making unnecessary *Erie* 'guesses' and to offer the state court the opportunity to interpret *or change* existing law.") (emphasis added).

to show that an imbalance exists, but also that "the application of [the] employment practice . . . has created the disparate impact under attack." *Id.*

In support of their disparate impact claim, plaintiffs submit the report of their "expert," Dr. George Ignatin ("Ignatin"), in which Ignatin attempts to correlate the salary inadequacies claimed by plaintiffs to CUPA—the university-wide salary policy adopted by the University after the settlement of *MacPherson I*. According to Ignatin, CUPA establishes a salary formulation whereby older professors' salaries are either depressed or stagnant while new money can be and is directed by the University to younger faculty.

The University does not attempt to discount the factual basis for Ignatin's theory nor the soundness of his conclusions. Nor does the University offer evidence that CUPA "serves, in a significant way, the legitimate employment goals of the employer," the primary means of refuting a *prima facie* case of disparate impact. *MacPherson I*, 922 F.2d at 771. The University, instead, asks the court to refuse to consider this latest submission by Ignatin inasmuch as it was submitted by plaintiffs after the time for filing expert reports called for in the court's scheduling order entered on March 28, 1995.

The scheduling order in this action called for the parties to supplement all expert reports at least 30 days before a pre-trial conference. The pre-trial conference was held in this action on June 26, 1996. The latest report by Ignatin, submitted by plaintiffs on June 28, 1996, was clearly outside of that time. Because this tardiness would make this portion of Ignatin's expert testimony subject to exclusion at trial through a motion *in limine*, the University argues that it cannot now be used by plaintiffs to avoid summary judgment.

When ruling on motions for summary judgment, the court is ordinarily constrained to consider *"admissible evidence,* [showing] affirmatively that the [proponent] is competent to testify to the matters stated therein." F.R.Civ.P. 56(e) (emphasis added). In spite of this seemingly plain directive in Rule 56(e), it is unclear in the Eleventh Circuit whether information contained in Rule 56 evidentiary materials, especially that submitted by a non-movant, must be admissible at trial in order to be considered at the summary judgment stage. *See International Ship Repair and Marine Services, Inc. v. St. Paul Fire & Marine Ins. Co.*, 906 F. Supp. 645, 648 (M.D. Fla. 1995) (citing *Church of Scientology Flag Service Org. v. City of Clearwater,* 2 F.3d 1514, 1530 (11th Cir. 1993), *cert. denied,* 115 S.Ct. 54 (1994) (materials inadmissible at trial may be submitted by non-moving party in opposing Rule 56 motion); *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013, 1015 & n.1 (11th Cir. 1987) (letter composed of inadmissible hearsay may be considered at summary judgment stage)).

While this court could expend great amounts of time and energy sorting through plaintiffs' supporting material in an effort to cull that which might not be admissible, it chooses instead to embrace the resolution reached by its sister court in *International Ship.* As the court did there, the court will consider *all* evidence submitted by plaintiff as non-movant, admissible or not, in ruling on the Univerity's Rule 56 motion. The question of the admissibility of the third Ignatin report will be postponed until trial.[4]

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[4] The University has, however, provided sufficient grounds for a request to re-depose Ignatin in light of this latest report. Should the University move to do so, and expecting no objection from plaintiffs, such a motion will be granted.

The University has mounted no serious challenge as to whether the evidence thus far submitted by plaintiffs creates a question as to whether CUPA, as a university-wide salary policy, disproportionally and impermissibly impacts the salaries of faculty in the age group protected by the ADEA. Plaintiffs have satisfied the court that a genuine issue of material fact exists with regard to their claims of disparate impact discrimination under the ADEA. As a result, the University's motion for summary judgment will be denied as to those claims.

B. Retaliation

A plaintiff alleging retaliation under the ADEA establishes a *prima facie* case by showing "(1) that [he] engaged in statutorily protected activity, (2) that an adverse employment action occurred, and (3) that the adverse action was causally related to the plaintiff's protected activities." *Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1974 (11th Cir. 1995) (Title VII retaliation). Of the three elements of this *prima facie* case, the University only disputes the element of causation. On the issue of cauation, "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." *Id.* (citation omitted).

Plaintiffs have presented evidence that Word, who conducted subjective yet important teaching evaluations of plaintiffs that affected merit raises and promotions, considered plaintiffs' lawsuit and subsequent grievances to be "harassment." *Word depo. I* at 78. Plaintiffs have also submitted proof that after the settlement of *MacPherson I*, they were denied promotions within the COB, they were denied requested sabbaticals to do research necessary for promotion, they have not been appointed

to COB and university-wide committees by Word and they were not offered lucrative retirement packages offered to other faculty pursuant to a university-wide plan.

For the purposes of summary judgment, this evidence crawls past the threshold of proof that the prior lawsuit and grievances filed by plaintiffs are not wholly unrelated to the negative employment decisions described above. As a result, plaintiffs have demonstrated that a genuine issue of material fact exists on their claims of ADEA retaliation. Accordingly, the University's motion for summary judgment must be denied as plaintiffs' claims of ADEA retaliation.

C. Salary Claims

In its brief, the University concedes that triable issues exist insofar as plaintiffs have made a disparate treatment discrimination claim under the ADEA with regards to (1) merit pay increases plaintiffs may have been denied since July of 1992, and (2) salary increases that might have resulted if plaintiffs had been promoted since July of 1992. Plaintiffs' remaining disparate treatment salary claim is that "Dean Word has failed to adjust Plaintiffs' salaries to eradicate inequities . . . ." *Plaintiffs' brief* at 11.

This lone remaining claim can only be interpreted to mean that plaintiffs seek redress for the alleged inadequacy of their salaries resulting from age discrimination prior to the settlement of *MacPherson I*. As an absolute defense to this claim, the University asserts that the releases and waivers signed by plaintiffs in conjunction with the settlement of *MacPherson I* bar any claim plaintiffs might have in regards to their salaries as they existed prior to July of 1992. This court agrees. As employment discrimination plaintiffs, MacPherson and Narz:

> may release not only claims for additional back pay, but also claims for other relief including injunctive provided the released claims arise from antecedent discriminatory events, acts, patterns, or practices, *or the 'continuing' or 'future' effects thereof* so long as such effects are causally rooted in origin, logic, and factual experience in discriminatory acts or practices which antedate the execution of the release, and provided, of course, that the release is executed voluntarily and with adequate knowledge . . . .

United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 853 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (emphasis added).[5] Because plaintiffs do not attack the validity of these releases and also because settlement of employment discrimination actions is to be encouraged, the court must give the releases the greatest effect possible.

As set out before, in exchange for a lump sum payments and instantaneous raises plaintiffs signed releases that waived their right to any claims for salary discrimination "arising to date out of or relating to their employment." If plaintiffs are now attempting to claim that raises since that settlement still do not address the gap that existed at the negotiated termination of *MacPherson I*, such claims are merely a back door attempt to circumvent their releases. This they will not be allowed to do.

Because plaintiffs signed releases that effectively waived any right they might have had to salary discrimination claims prior to July 10, 1992, they can not now claim that raises since that time have failed to make up for

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[5] The Eleventh Circuit adopted as precedent decisions of the old Fifth Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209-10 (11th Cir. 1981) (*en banc*).

discrimination that existed prior to July 10, 1992. To the extent plaintiffs attempt to make such a claim, the University's motion will be granted, and that portion of plaintiffs' action will be dismissed with prejudice.

D. Hostile Environment

Plaintiffs concede that their hostile environment discrimination claims are due to be dismissed. In fact they are so lacking in merit that an adverse reaction to plaintiffs by their employer, if there was such a reaction, might not constitute "retaliation." *See Amos v. Housing Auth. of Birmingham Dist.*, 927 F. Supp. 416 (N.D. Ala. 1996), *op. supplemented by Amos v. Housing Auth. of Birmingham Dist.*, 1996 WL 380521 (N.D. Ala. Apr. 15, 1996). Accordingly, the University's motion for summary judgment will be granted as to those claims, and plaintiffs' action, insofar as they make claims of hostile environment discrimination, will be dismissed with prejudice.

E. First Amendment

Left standing despite by the University's Rule 56 motion are plaintiffs' claims that the University has abridged their First Amendment right to engage in free speech by retaliating against them for filing employment related grievances and an employment discrimination lawsuit.[6] As the University is surely aware, in order to obtain summary judgment in its favor, it must initially shoulder the burden of "infor[ming] the district court of the basis for [its] motion." *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). This requires, at a

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[6] To preempt any argument by the University that plaintiffs have abandoned this claim, the court notes that plaintiffs reiterate their "free speech" claim in paragraph 5(a) of the pretrial order entered on June 26, 1996, which represents plaintiffs' final pleadings in this action. Rule 16(e), F.R.Civ.P.

minimum, that "[t]he moving party . . . *show* the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) (emphasis added).

The court devoutly wishes to eliminate all spurious issues before trial and can divine arguments which, had they been made, would have been successful as to the "free speech" claims. The tragedy in the University's failure to so argue is that the court is quite certain that both the court's time and the parties' time will be spent addressing this very same issue in a Rule 50 motion when the matter could now be put to bed. Perhaps plaintiffs will concede that these claims are a waste of time and will waste no more time on them. The scheduling order required parties to retreat from unmeritorious positions. As of this moment, however, because the University has failed to address the free speech claims (ignoring them may have been the University's ineffectual way of suggesting that they lack viability), the University's motion will be denied as to plaintiffs' claims that the University violated their right to free speech protected by the First Amendment.[7]

III. Conclusion

The University has demonstrated, and plaintiffs have failed to refute, that the releases signed by MacPherson and Narz on July 10, 1992, preclude any claims in this action regarding age discrimination that might have oc-

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[7] The court is, of course, aware that the First Amendment (1) does not provide a private right of action for the enforcement of its protections, (2) is not directly applicable to the University as the representative arm of the *State* of Alabama and (3) requires that the subject matter of protected speech be of general public interest. However, the court would not have to make much of a "notice pleading" stretch to find that plaintiffs have pled sufficient facts for a claim under the Fourteenth Amendment pursuant to 42 U.S.C. § 1983.

curred before that date. As a result, the University is entitled to summary judgment on plaintiffs' claims that the denial of salary increases after July 10, 1992, failed to address age discrimination that might have occurred prior to July 10, 1992, is also actionable age discrimination. To the extent plaintiffs make such claims, the University's motion for partial summary judgment will be granted, and plaintiffs' action, insofar as they make such a claim, will be dismissed with prejudice. Because plaintiffs also concede that the University is entitled to judgment as a matter of law as to their clamis of hostile environment ADEA discrimination, the University's motion will be granted as to those claims, and plaintiffs' action, insofar as they make such claims, will be dismissed with prejudice.

In contrast, plaintiffs have shown under Rule 56 standards that genuine issues of material fact exist with regards to all other claims attacked by the University in its Rule 56 motion. Accordingly, the University's motion will be denied as to plaintiffs' claims of disparate treatment and disparate impact discrimination and retaliation under the ADEA as well as plaintiffs' claims that the University has impermissibly interfered with their right to engage in the free speech protected by the First Amendment.

A separate and appropriate order will be so entered.

DONE this 19th day of July, 1996.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Court

[Filed Jul. 19, 1996]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Caption Omitted]

ORDER

In conformity with the accompanying memorandum opinion, the court EXPRESSLY DETERMINES that there exist no genuine issues of material fact as to certain issues and that defendant, University of Montevallo ("the University"), is entitled to summary judgment as a matter of law as to said issues. Accordingly, it is ORDERED, ADJUDGED and DECREED by the court that the motion for partial summary judgment of the University be and the same is hereby GRANTED as to:

(1) plaintiffs' claims that the University's failure to award them pay raises after July 10, 1992, to redress age discrimination that might have occurred prior to July 10, 1992, is actionable age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("the ADEA"); plaintiffs' action, to the extent they make such claims, is dismissed with prejudice;

(2) plaintiff's claims that the University is liable for hostile environment age discrimination in violation of the ADEA; plaintiffs' action, to the extent they make such claims, is dismissed with prejudice.

The University's motion for partial summary judgment, to the extent it is addressed to the remainder of plaintiffs'

claims, is DENIED. Surviving the University's Rule 56 motion are plaintiffs' claims that the University has violated their constitutional right to engage in free speech and has engaged in disparate impact discrimination, disparate treatment discrimination and retaliation in violation of the ADEA. Plaintiffs' action, insofar as they make these claims, shall proceed to trial.

DONE this 19th day of July, 1996

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

Case No. 5:96cv207-RH

WELLINGTON N. DICKSON,
a/k/a "Duke",
Plaintiff,

vs.

FLORIDA DEPARTMENT OF CORRECTIONS,
Defendant.

ANSWER, AFFIRMATIVE DEFENSES AND JURY TRIAL DEMAND

Defendant FLORIDA DEPARTMENT OF CORRECTIONS, by and through undersigned counsel, hereby files this ANSWER, AFFIRMATIVE DEFENSES AND JURY TRIAL DEMAND, and states as follows:

ANSWER

1. Admits Plaintiff is a resident of Marianna County, Florida.

2. Admits Florida Department of Corrections (DOC) is an entity created under Florida law with a principle place of business in the State of Florida, at the City of Tallahassee, and that the DOC oversees a prison facility in Jackson County.

3. No response required.

4. Admits Folsom and Childs are employees of DOC. Otherwise, no response required.

5. Admits DOC is an "employer" as defined under the ADA and ADEA.

6. Admits that this action was brought under the ADA and the ADEA, but denies that this court has subject matter jurisdiction and denies that the action has merit.

7. Admits that Plaintiff filed a charge with the Florida Commission on Human Relations and the Equal Employment Opportunity Commission.

8. Defendant is without knowledge as to the allegations in Paragraph 8, and therefore those allegations are denied.

9. Denied.

10. Defendant incorporates the responses to numbers 1 through 9 above.

11. Admits that Plaintiff was employed as a Corrections Officer at Apalachee Correctional Institution. Defendant is without knowledge as to the remainder of the allegations in Paragraph 11, and therefore those allegations are denied.

12. Denies that promotions at any institution are limited by any unlawful means. Defendant is without knowledge as to the allegations in Paragraph 12, and therefore those allegations are denied.

13. Admits those individuals applied for jobs at Jackson Correctional Institution (JCI). Admits that Major Childs noted the possibility of promotion under the appropriate circumstances. Denies any promise of promotion.

14. Admits Plaintiff was hired as a Correctional Officer at JCI. Admits Plaintiff assisted in construction work at JCI. Defendant is without knowledge as to the remainder of the allegations in Paragraph 14, and therefore, those allegations are denied.

15. Admits various CO Sergeant positions became available in 1991. Defendant is without knowledge as to the remainder of the allegations in Paragraph 15, and therefore, those allegations are denied.

16. Denies that Plaintiff was subjected to harassment or retaliation. Defendant is without knowledge as to the remainder of the allegations in Paragraph 16, and therefore, those allegations are denied.

17. Denies Plaintiff was the most qualified for the positions of CO Sergeant for which he applied. Admits Plaintiff was desirous of promotion to Sergeant. Defendant is without knowledge as to the remainder of the allegations in Paragraph 17, and therefore, those allegations are denied.

18. Defendant is without specific knowledge of the information set forth in the first sentence of Paragraph 18, and therefore that allegation is denied. The second allegation of Paragraph 18 is denied. The third allegation of Paragraph 18 is denied as stated. Defendant is without sufficient knowledge as to the remainder of the allegations, and therefore, those allegations are denied.

19. Defendant admits the allegations set forth in the first, second, third, and fourth sentences of Paragraph 19. Defendant is without sufficient knowledge with regard to the consistent timeliness of applications for promotion submitted by Plaintiff, and therefore that allegation is denied. Defendant denies that the usual procedures for promotion were circumvented and denies that Plaintiff was discriminated against in any fashion.

20. Denies that Plaintiff was more qualified than those selected for promotions. Defendant is without knowledge of Plaintiff's age at the time in question and therefore that allegation is denied.

21. Defendant denies that any individual selected for promotion was less qualified than Plaintiff. Defendant is without sufficient knowledge as to whether the named individuals received the promotions in question and therefore that allegation is denied.

22. Admits that various CO Sergeant positions became available during 1992. Defendant is without knowledge of whether or when Plaintiff learned of these openings and therefore denies this allegation.

23. Defendant denies that Plaintiff was more qualified for the Sergeant positions than those selected. Admits that Plaintiff desired promotion.

24. Defendant is without sufficient knowledge of the individual selected for the position in question, or that individuals age or background, and therefore those allegations are denied. Defendant denies that any individual selected for promotion was less qualified than Plaintiff.

25. The allegations set forth in the first sentence of Paragraph 25 are denied are written. The allegations of the second sentence are denied.

26. Denies that Plaintiff was more qualified for the positions sought. Defendant is without knowledge of Plaintiff's exact age at the time in question and therefore that allegation is denied. Defendant admits Plaintiff was over 40 years of age.

27. Defendant admits Plaintiff submitted a yearly application for advancement in 1992, and admits there were openings for the position of CO Sergeant in 1992. Defendant is without sufficient knowledge as to the remaining allegations of Paragraph 27 and therefore those allegations are denied.

28. Defendant admits there were openings for the position of CO Sergeant in 1992 at JCI.

29. Defendant admits there were openings for the position of CO Sergeant in 1992 at JCI. Admits that Plaintiff was interviewed but did not receive a promotion, and that Lee Blalock was promoted at this time. Denies that any individual promoted was less qualified than Plaintiff.

30. Admits the allegations in the first sentence of Paragraph 30. Defendant is without sufficient knowledge as to the individual promoted at this time since no position numbers were provided, and therefore those allegations are denied. Defendant is without sufficient knowledge as to the remaining allegations in Paragraph 30, and therefore those allegations are denied.

31. Denied.

32. Admits there were openings for the position of CO Sergeant in 1994. Denies the allegations in the second sentence of Paragraph 32 and denies that Plaintiff was subjected to any unlawful discrimination. Admits that the named individuals were promoted. Is without sufficient knowledge as to the affiliations of the named individuals with Major Childs and therefore those allegations are denied.

33. Admits there were openings for the position of CO Sergeant in 1994. Is without sufficient knowledge as to the individual placed in the position in question. Denies that the individual was less qualified for the position than Plaintiff.

34. Admits there were openings for the position of CO Sergeant in 1994. Denies Plaintiff was preselected for any position. Defendant is without sufficient knowledge as to the remaining allegations and therefore those allegations are denied.

35. Admits there were openings for the position of CO Sergeant in 1994. Defendant is without sufficient

knowledge as to the individuals selected for the positions in question, and therefore those allegations are denied. Defendant denies the remaining allegations in Paragraph 35.

36. Admits Plaintiff filed a grievance with the Police Benevolence Association. Defendant is without sufficient knowledge regarding the remaining allegations and therefore those allegations are denied.

37. Admits that Plaintiff filed a charge with the Florida Commission on Human Relations on or about October 25, 1994 claiming age and disability discrimination. Defendant is without sufficient knowledge as to whether o. when Plaintiff filed a complaint with the PBA and therefore those allegations are denied.

38. Admits Plaintiff submitted some letters from physicians to agents of the Defendant and the letters indicated that Plaintiff could continue his duties as a Correctional Officer with the exception of climbing the 60 foot towers and heavy construction work. Defendant is without sufficient knowledge as to the remaining allegations and therefore those allegations are denied.

39. Defendant is without sufficient knowledge as to the allegations set forth in Paragraph 39, and therefore those allegations are denied.

40. The allegations of the first sentence of Paragraph 40 are denied as written. Defendant is without sufficient knowledge as to the remaining allegations of Paragraph 40, and therefore those allegations are denied.

41. Defendant is without sufficient knowledge as to the allegations set forth in Paragraph 41, and therefore those allegations are denied.

42. Admits Plaintiff used some leave time in November of 1994. The remaining allegations are denied as

written. Defendant denies that Plaintiff was subjected to harassment.

43. Admits that Plaintiff worked for Defendant in 1994 and that there were various openings for the position of CO Sergeant during 1994. Admits that Plaintiff interviewed for various CO Sergeant positions at JCI. Defendant denies that Plaintiff was more qualified than any of the individuals selected for the positions Plaintiff sought. Defendant is without sufficient information as to the Plaintiff's conversation with Mr. Boyd and therefore that allegation is denied.

44. Admits CO Sergeant Positions 29377, 29376, 29375, and 29374 were open in January of 1995. Denies that Plaintiff was discriminated against. Admits that the individuals named in Paragraph 44 were selected for the above referenced positions. Denies that Plaintiff was subjected to retaliation. Denies that Plaintiff was more qualified than the selected applicants.

45. Admits positions 24717, 24623, 24674, 24675, became available in 1995. Admits Plaintiff sought promotion to CO Sergeant in 1995. Denies that Plaintiff was not considered or passed over for less qualified applicants. Admits that the listed individuals were selected for the referenced positions.

46. Admits positions 24719, 24661, and 24658, became available in 1995 and that Plaintiff applied for those positions. Admits that Officers Paramore, Krause, and Butler were hired for those positions. The remainder of the allegations are denied. Defendant denies that the individuals hired for those positions were less qualified than Plaintiff.

47. Admits positions 24690 and 24674 became available in 1995. The remaining allegations of Paragraph 47 are denied.

48. Admits positions 33416 and 33417 became available in 1995. Denies Plaintiff was subjected to retaliation. Denies any individual hired or promoted to these positions was less qualified than Plaintiff. Admits Plaintiff was over the age of 40 in 1995. Admits that Officers Edge and Powe were selected for these positions. Denies any other allegations set forth in Paragraph 48.

49. Admits openings for the position of CO Sergeant in 1996. Admits Plaintiff desired promotion to the position of CO Sergeant. The remaining allegations are denied as written. Defendant denies that any individual hired or promoted for a position sought by Plaintiff was less qualified than Plaintiff.

50. Defendant realleges and adopts by reference the answers set forth in Paragraphs 1 through 49 above. Admits that Positions 24620 and 24732 were open in July of 1994. The remaining allegations are denied as written. Defendant denies that Plaintiff was promised a promotion.

51. Admits that Plaintiff falls within the age group identified in the Age Discrimination in Employment Act. Defendant denies that Plaintiff was promised a promotion. The remaining allegations are denied as written.

52. Admits that there are guidelines for use in consideration of individuals for promotion. Denies that any procedure, guideline, or standard was circumvented or misapplied by Defendant or agents of Defendant for any unlawful purpose.

53. Denies that Plaintiff was more qualified than the individuals selected for the positions Plaintiff sought. Admits that Plaintiff was over the age of 40 at the time in question.

54. The allegations of Paragraph 54 are denied as written. Defendant denies that Plaintiff was more quali-

fied than any individual hired for any position sought by Plaintiff.

WHEREFORE, Defendant requests that Plaintiff be offorded no relief and all claims be dismissed.

55. Defendant realleges and adopts by reference the answers of Paragraphs 1-54, set forth above. Defendant is without knowledge of Plaintiff's information at the time in question and therefore that allegation is denied. Defendant admits that there were openings for the position of CO Sergeant in 1994.

56. Admits that Plaintiff desired promotion. All other allegations are denied as written. Denies that Plaintiff was promised a promotion.

57. Admits that Plaintiff was interviewed for various Sergeant positions in 1994. All other allegations are denied.

58. Denied as written.

59. Admits the open positions for CO Sergeant were filled. The remaining allegations are denied as written.

60. Admits Plaintiff filed a grievance. Defendant is without sufficient knowledge as to the satisfaction of all prerequisites and conditions precedent and therefore those allegations are denied.

WHEREFORE, Defendant requests that Plaintiff be afforded no relief and that all claims be dismissed.

61. Defendant realleges and adopts by reference the answers of Paragraphs 1-60, set forth above. Admits that there were openings for the position of CO Sergeant in 1994.

62. Admits Plaintiff was over the age of 40 in 1994. The remaining allegations are denied.

63. Denied as written.

64. Defendant is without knowledge of Plaintiff's personal finances and therefore those allegations are denied. All other allegations are denied as written. Defendant denies that Plaintiff was subjected to any retaliation.

65. Admits Plaintiff desired promotion. All other allegations are denied as written.

66. Admits the referenced positions were filled by the named individuals. The remaining allegations are denied.

67. Denied.

68. Admits Plaintiff was over the age of 40 at the time in question. All other allegations denied.

69. Admits Officers Brown and Hearns were promoted to CO Sergeant. Defendant denies that Brown and Hearns were less qualified for promotion to Sergeant than Plaintiff. The remaining allegations are denied as written.

WHEREFORE, Defendant requests that Plaintiff be afforded no relief and that all claims be dismissed.

70. Defendant realleges and adopts by reference the answers of Paragraphs 1-69, set forth above.

71. Admits that Plaintiff desired promotion to the position of CO Sergeant. All other allegations denied as written.

72. Admits Plaintiff returned to work in November of 1994 after leave. All other allegations are denied as written.

73. Denied as written.

74. Defendant is without knowledge of Plaintiff's economic situation and therefore that allegation is denied. Defendant denies that Plaintiff was subjected to any re-

taliation. Defendant denies any violation of the ADEA or ADA. All other allegations are denied as written.

75. Denied.

WHEREFORE, Defendant requests that Plaintiff be afforded no relief and that all claims be dismissed.

76. Defendant realleges and adopts by reference the answers of Paragraphs 1-75, set forth above.

77. (Mis-numbered 74.) Defendant realleges the responses of Paragraphs 44-75. Defendant admits that Edenfield, Rabon, Bowen and Spates, were promoted to CO Sergeant. Defendant denies that those individuals, or any others hired or promoted to CO Sergeant positions sought by Plaintiff were less qualified than Plaintiff. The remaining allegations are denied.

78. Defendant is without sufficient knowledge of whether Plaintiff discovered that the toilets at JCI were improperly installed and therefore that allegation is denied. All other allegations are denied.

79. Defendant is without sufficient knowledge of the allegations of Paragraph 79, and therefore those allegations are denied.

80. Denied.

81. Defendant is without sufficient information as to whether Plaintiff has fulfilled all conditions precedent to suit and therefore that allegations is denied, as is the allegation that this suit is timely filed.

WHEREFORE, Defendant requests that Plaintiff be afforded no relief and that all claims be dismissed.

82. Defendant realleges and adopts by reference the answers of Paragraphs 1-80, set forth above.

83. Denied.

84. Denied.

WHEREFORE, Defendant requests that Plaintiff be afforded no relief and that all claims be dismissed.

85. Any and all statements or allegations of the Complaint not expressly admitted are denied.

AFFIRMATIVE DEFENSES

Defendant states the following Affirmative Defenses:

1. Plaintiff has failed to state any cause of action for which relief can be granted.

2. Plaintiff has failed to sufficiently exhaust administrative remedies.

3. Plaintiff has failed to fulfill conditions precedent to bring an action in court.

4. Plaintiff is not a qualified individual with a disability under the ADA, 42 U.S.C. § 12111(8).

5. Plaintiff is not otherwise qualified within the meaning of the ADA. 42 U.S.C. § 12112.

6. Plaintiff could not reasonably be accommodated in the manner prescribed by the ADA, 42 U.S.C. § 12112.

7. Defendant's actions were required by business necessity and were based on factors other than Plaintiff's disability, if he suffers any disability.

8. Defendant's actions or inactions were premised upon bona fide occupational qualifications reasonably necessary to the normal operations of business as allowed under the ADEA, 29 U.S.C. § 623(f)(1).

9. The employment practices of the DOC are now, and have been during the time referred to in the Complaint, conducted in all respects in accordance with state and federal laws, regulations and constitutions.

10. All defenses provided and allowable by law.

JURY TRIAL BY DEMAND

Defendant requests a trial by jury on all issues so triable by law.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

/s/ Lynn Franklin
LYNN FRANKLIN
Assistant Attorney General
Florida Bar No. 0025770

Office of the Attorney General
PL-01 the Capitol
Tallahassee, FL 32399-1050
904/488-1573
904/488-4872, fax

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